No. 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA,
Petitioner,

v.

THOMAS F. JOHNSON

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THOMAS F. JOHNSON

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INDEX

Table of Contents

CITATIONS

Statutes

Texts

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 337 F.2d 180. The opinion of the District Court is reported at 215 F. Supp. 300.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1964. On October 19, 1964, the Chief Justice extended the time for filing the petition for a writ of certiorari to and including November 15, 1964 (a Sunday). The petition was filed on November 16, 1964, and was granted on January 25, 1965 (379 U.S. 988).[1]

[1] As the judgment of the Court of Appeals was entered on September 16, 1964, the last date on which to apply for certiorari would maybe have been October 16, 1964, but for the extension order entered October 19, 1964. That order by its terms fixed the last permissible date as November 15, 1964. It doubtful whether Rule 34(1)'s provision that when computation of a period of time results in a Sunday as the last day, the period embraces Monday, applies when the order of a Justice explicitly fixes a definitive last day. Johnson does not press this point and hopes that the Court will decide this case on its merits.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Article 1, Section 6, of the Constitution providing that "for any speech or debate in either House they [members of Congress] shall not be questioned in any other place" permits the government to make a criminal charge that a member of Congress collaborated with others in the preparation of a speech in the House of Representatives, made the speech there for their benefit and received a gift for doing so.

2. Whether in enacting the conspiracy statute Congress intended that it should apply to an alleged conspiracy to make a speech in the House of Representatives for compensation.

3. Whether the indefinite nature of the conspiracy charge violated Johnson's Fifth and Sixth Amendment right that the indictment clearly inform him of the offense charged.

4. Whether this Court should repudiate the all embracing concept of conspiracy to defraud of Section 371 sought by the government.

5. Whether the District Court erred in refusing Johnson access to the transcript of testimony before the Grand Jury which indicted him when the government had breached the "seal of secrecy" in violation of Criminal Rule 6(e).

6. Whether the Fourth Circuit erred in holding that original interview notes of FBI agents are not producible under the Jencks Act.

7. Whether the District Court committed error in refusing to instruct the jury as to an essential element of the substantive offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the United States Constitution provides in part:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

AMENDMENT I.

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

AMENDMENT VI.

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . .

18 U.S.C. 371, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 281, which was repealed after the alleged commission of the acts involved in this case, provided in part:

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

STATEMENT

A.

General

Thomas F. Johnson lives in Berlin, Worcester County, Maryland. He practiced law in Berlin and Snow Hill on the Eastern Shore of Maryland and had an office in Baltimore with a well known member of the Baltimore Bar. Johnson served as State's Attorney for Worcester County from 1934 until 1939 and in the State Senate of Maryland from 1939 until 1951. He was elected to Congress from the First Congressional District in 1958 and reelected in 1960 (App. 559-560). Johnson ran again for Congress in the fall of 1962 and, although indicted three weeks before the general election, he was only narrowly defeated.[2] While

[2] Johnson received approximately 30,000 votes, and his Republican opponent 33,000 (App. 560).

in the State Senate of Maryland and later in Congress, Johnson continued to practice law in Snow Hill and Berlin as well as in Baltimore (App. 560-561).

B.

The Evidence As To The Speech

While the government states that ten days before Johnson's speech Robinson issued a check to Johnson for $500.00 (Gov't Brief, p. 5), it fails to tell the Court that his covering letter made clear that this was a political campaign contribution and it was so treated by Johnson (App. 566). The check was deposited in the bank account of his campaign treasurer and used, as in the case of his other campaign contributions, for advertising, radio, television, etc. in support of the candidacies of John F. Kennedy, Lyndon B. Johnson and the defendant Johnson (App. 252, 567). The check was made a matter of public record by its inclusion in an itemized report filed by the treasurer in the Circuit Court for Worcester County (App. 567).

Although Robinson made his political campaign contribution of $500.00 to Johnson on June 20, 1960, no one testified that Johnson solicited or was promised the contribution provided he would make a speech defending Maryland State Savings and Loan Associations from an attack in the Washington Star. The Star article, of May 27, 1960, in labeling all Maryland State Savings and Loan Associations as "phonies" (Gov't Exhibit 55), was so unfair that it would seem a Maryland Congressman was not only entitled, but almost obligated, to reply to it.

In 1960 and 1961 defendant J. Kenneth Edlin was a dominant figure in two Maryland savings and loan institutions, First Colony Savings and Loan Association and First Continental Savings and Loan Association, and the defendant William L. Robinson was the general counsel

for these associations. In April and May, 1960, Edlin, Robinson and Heflin, public relations man for an Institute of Independent Savings and Loan Associations promoted by Edlin, had been discussing allegedly unfair abuses of state savings and loan associations by the Federal Savings and Loan League and by other detractors. Robinson or Edlin expressed the hope that a member of Congress might make a speech on this subject and Heflin received a draft of such a speech from Robinson on May 2, 1960. Heflin made some corrections in the draft, as well as several additional drafts, and returned them to Robinson (App. 182-184).

In the spring of 1960 Johnson had met Edlin and Robinson in connection with the financing of an Assateague Island Bridge project in Worcester County, Maryland, Johnson's home county. In May, 1960, at a luncheon of Marshall Diggs, a prominent lawyer of Washington, Johnson, Edlin and Heflin at the Congressional Hotel, Heflin was introduced to Johnson as a public relations man for the Institute of Independent Savings and Loan Associations. There was conversation about the Assateague Island Bridge project with which Diggs and Johnson were connected (App. 197). Heflin and Edlin then talked about the unjustified attacks made upon state savings and loan associations by a Federal Savings and Loan League. Heflin described the plight of the independent state savings and loan association in competition with federal savings and loan associations. He argued that though "federally insured" the federal associations were not as good an investment as the state savings and loan associations because F.S.L.I.C.'s assets were less than 1% of the insured liability. Heflin also told the Congressman that some federals had been advertising that their deposits were guaranteed by the United States Government when, in reality, they were not

(App. 149-50). Heflin pointed out to Johnson that the independent savings and loan industry in Maryland was being jeopardized by the Federal Savings and Loan League (App. 186). Johnson listened attentively (App. 186, 197). This was the only meeting of Johnson and Edlin during the months of May, June and July, 1960.

On May 27, 1960, a newspaper article in the Washington Star characterized all Maryland state savings and loan associations as "phonies" (Gov't Exhibit 55) although these associations constituted one of Maryland's oldest industries. Buarque, Johnson's administrative assistant, testified that upon publication of the Star article, he had seen it, "considered it a smear" on a Maryland industry, showed it to Johnson and told him he should answer it. Johnson told Buarque to write something for him (App. 468, 469). Heflin and Robinson went to see Johnson in his office and showed him a copy of the newspaper article as evidence of the mistreatment of the independent savings and loan associations (App. 186). Heflin, a government witness, testified that he told Johnson "It was categorically unfair. I still think so" (App. 189, 201).

Johnson turned Heflin over to his administrative assistant, Buarque. Thereafter, Heflin supplied some facts and figures for the draft of a speech which Buarque prepared (App. 189, 190).

There was no evidence that Johnson or Buarque discussed the contents of the speech with Edlin or Robinson. Johnson and Buarque testified without contradiction that they had not seen the earlier draft of a speech prepared by Robinson (App. 479), and it will be found that Robinson's May draft (App. 183) bears no substantial relationship to the speech prepared for Johnson by Buarque. Heflin, a government witness, testified that he did not prepare the

speech; it was prepared by Buarque (App. 200). Buarque confirmed this.[3]

The speech was devoted to answering the newspaper article attacking the integrity of the entire Maryland state savings and loan industry. The speech contained no reference to First Continental Savings and Loan Association or to First Colony Savings and Loan Association, or to any other named association (App. 931).

Buarque and Johnson testified that the reasons for the speech were (1) they considered the Washington Star article an unfair attack upon a Maryland industry and (2) this might be an issue which Johnson could grasp because he had political ambitions for state office in 1964 and he was looking for a state-wide issue (App. 480). At that time there had been no substantial savings and loan scandal in Maryland.

After the speech was made on June 30, 1960, Heflin telephoned Buarque requesting reprints and Buarque replied that the Congressman would not bear any part of the cost of them (App. 463). Buarque requested Mrs. Kiernan in Johnson's Congressional office to order 10,000 reprints from the Government Printing Office (Tr. 2643). Later a second order was received from Heflin for 40,000 reprints. When Buarque questioned the number, Heflin pointed out that reprints of Congressman King's speech in the House of Representatives defending a state savings and loan association equalled 50,000 (App. 483). Mrs. Kiernan ordered them. The small checks for reprints were endorsed by Johnson over to the Printing Office. There was no evidence that Johnson had any knowledge of the orders for

[3] Buarque also identified his draft of the speech in his handwriting. (App. 477).

reprints except when Mrs. Kiernan submitted to him the checks for his endorsement.

Although Robinson was later reimbursed for his $500 contribution to Johnson's campaign for reelection by First Continental Savings and Loan Association, there was no evidence contradicting the testimony of Johnson and Robinson that Johnson was not told that Robinson was so reimbursed. Naturally, First Continental wished a Congressman who might support state savings and loan associations to be elected.

There was no evidence that during the months of May, June and July, 1960, Johnson met with, or talked to, Edlin except at the May, 1960, luncheon attended by a number of persons. No evidence was introduced that an agreement of any kind was made at this luncheon. There was no evidence that during this time Johnson met with, or talked to, Robinson except upon the single occasion when Robinson and Heflin came to his Congressional office and showed him the Washington Star article of May 27, 1960, as evidence of the mistreatment of the Maryland state savings and loan associations, and there was no evidence of any agreement at that meeting. Throughout this long trial no one testified that there was an understanding that, if Johnson agreed to make the speech, he would receive a political campaign contribution or that he agreed to make the speech in consideration of the contribution. There was no evidence that Johnson had requested that a contribution be made to his campaign for reelection.

As to the distribution of the reprints of Mr. Johnson's speech, the savings and loan associations used them in the same way they used reprints of a speech of Congressman King of California and another of Congressman Utt of

California[4] (App. 201). Johnson testified that he had no knowledge of the distribution, or use, of these reprints (App. 573) and the government offered no evidence to the contrary.

As evidence of a criminal conspiracy to make a speech in the Congress, the government relies in its brief (p. 4, 6) upon the fact that Sadie Goldman[5] said that Edlin said, out of the presence of Johnson, he had made a "new contact" with a Congressman as a result of which "we are going to be rich". She also said that Robinson said that Johnson was "on our payroll" (App. 161, 162). The Government's brief (p. 6) also relies upon a statement of Raines that Edlin said to him out of the presence of Johnson "you see, we have friends on the Hill—we have nothing to fear on our indictment. These people are interested in us and the injustice we have been done"[6] (III, App. 4). In concluding that there was a sufficiency of evidence the Court of Appeals relied upon these statements (337 F.2d 196-201).

These statements of Mrs. Goldman and Mr. Raines, hearsay as to Johnson, were admitted by the District Court only against Edlin or Robinson. The District Judge correctly ruled that statements out of the presence of Johnson were not admissible against him (Tr. 421, 422). They

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[4] On April 28, 1960, Congressman Utt of California made a speech in the House of Representatives on behalf of the Long Beach Savings and Loan Association, denouncing the treatment of that Association by the Federal Home Loan Bank Board. On May 19, 1960, Congressman Cecil King of California made a speech in the House of Representatives on the same subject. (Tr. 470-71).

[5] Mrs. Goldman's husband had been President of First Continental and he was under indictment at the time of the trial (App. 279). The indictment was dismissed as to him after the trial of Johnson.

[6] An indictment against Raines was dismissed after the trial of Johnson.

were not admissible against Johnson under any known legal theory.

C.

THE SUBSTANTIVE COUNTS

The issue under each of the substantive counts was whether a particular check of Robinson or of First Continental designated in those counts was received by Johnson as compensation for his visits to the Attorney General and to the Assistant Attorney General in charge of the Criminal Division. There was no substantial dispute as to the visits to Justice by Johnson. It was undisputed that Johnson did not receive any payments from Edlin or any other defendant in the criminal case pending before the Department of Justice. It was undisputed that Johnson did receive the checks of Robinson and First Continental specified in the substantive counts and that he deposited them in his bank account as in the case of other legal fees. As in the case of other payments made by Robinson to 4 or 5 other reputable attorneys for their legal services for the savings and loan associations, Robinson was reimbursed for them (Tr. 4286-87). On the books of First Continental they were recorded as "legal fees" or "legal services" or "escrow account—Charles County Land Co." or "payment in full—Brooke [Brooke Virginia property]."

The government contended that it was a reasonable inference that these payments in whole or in substantial part constituted compensation for Johnson's visits to Justice. It was contended on behalf of Johnson that they represented payments on account of his legal services rendered First Continental and Charles County Land Company and Leisure City Land Company unrelated to his visits to Justice and, as Johnson and Robinson testified, he had not been employed by Edlin or anyone else to make his visits

to Justice and he did not receive any compensation for them.

Facts with respect to Johnson's visits to Justice not mentioned by the Government are:

(1) Johnson had been told by Edlin and Robinson that the pending criminal charge[6a] was unjust and had been inspired by competitors (App. 695); Johnson asked for a review of the criminal case upon its merits (Kennedy, App. 864; Miller, Tr. 2150).

(2) Johnson made no misrepresentation and no coercive statement.

(3) The Attorney General and Assistant Attorney General both testified that Johnson at the meetings said that he did not wish to interfere with the Department of Justice and he was not asking for any favors or anything improper from the Department of Justice (App. 409, 438, 862, 869, 871, 873).

(4) The Attorney General and Assistant Attorney General indicated that at the time of the meetings they did not consider the visits to be improper. There was no policy of the Attorney General against such visits by Congressmen (App. 855, 862).

(5) Johnson's visits had no effect upon the course of the criminal case and Johnson did not return to Justice after he understood in September, 1961, that a final review decision had been made to go forward with it.

(6) No one testified that any checks specified in the substantive counts, or any other checks, were paid to Johnson for his visits to Justice. The government relied in large part upon the hearsay statements out of the presence of Johnson which were not admitted against Johnson (See p. 10 herein).

[6a] A defendant, First Colony, was located at Elkton in Johnson's Congressional District.

There was no evidence that Johnson had any relationship to the savings and loan associations except as local Maryland counsel for their general counsel, Robinson. Johnson was not an officer, director or shareholder of the savings and loan associations. There was no evidence that he participated in any policy decisions with respect to their operation.

Although there was clear venue in the District of Columbia of the substantive counts, as the place where the alleged services were rendered, i.e., the Department of Justice, and where the checks were received by Johnson, the government elected the District of Maryland where the only possible basis of venue—where Johnson deposited the checks in his Berlin, Maryland, bank account—was tenuous and highly conceptualistic (App. 61). The District Court acknowledged that "it is unfortunate that questions of venue should turn upon the banking law of the place where the checks were deposited . . ." (App. 68). The Court of Appeals struggled with the problem without really solving the venue perplexities engendered by the government's selection of the artificial Maryland venue. 337 F.2d at 193-195.[7]

The highly charged atmosphere of the trial worked a heavy burden on court, counsel and jurors alike. In spite of his presumption of innocence, the timing of the indictment 3 weeks before the election had caused Johnson to be defeated for reelection to Congress by his Republican opponent. Congressman Johnson's speech defending Maryland state savings and loan associations and criticizing

[7] If the intricacies and variations of State negotiable instruments law are too much for the United States to abide by in civil cases, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), they certainly furnish a questionable norm for venue in federal criminal cases. The clear and appropriate venue was the District of Columbia.

Federal savings and loan associations and the Federal Savings and Loan Insurance Corporation was bound to be viewed as an attack on the concept of federal insurance. At the time of trial the insolvency of some savings and loan associations in Maryland had been widely publicized and had aroused considerable public feeling. The fact that the Attorney General of the United States and the Assistant Attorney General of the United States in charge of the Criminal Division, testified on behalf of the prosecution and thus threw the weight of their high offices against the accused was without precedent. The inevitable publicity of the trial in the press and other mass media was unequalled as regards a criminal trial in the Baltimore/Washington area. The presence of all these factors made it extremely difficult to keep the scales of justice in balance.

SUMMARY OF ARGUMENT

The argument is in two parts—Part One showing that the conspiracy count is unconstitutional and Part Two dealing with issues decided by the Fourth Circuit in favor of the government.

Part One. The Court of Appeals was right in holding that the conspiracy count, and the evidence submitted under it, violated the Speech and Debate provision of the Constitution. We show the significance of unrestrained legislative speech in the light of the American tradition of free speech and recall the numerous decisions of this Court under the First Amendment that no inhibition upon uninhibited, robust utterances is tolerable and that the tradition of legislative liberty is so central to our Constitutional heritage that it is subject to no restraint by the executive power by reason of the uniqueness of the Con-

gressional forum with its potential for immediate and vital impact on the entire nation.

The ancient lineage of the Speech and Debate provision in the history of constitutional liberty demonstrates that it was designed to preclude the Crown from making any criminal charge with respect to the motivation or content of legislative speech. The notion of the government that the constitutional provision was intended to protect only the content of speech is not supported; it was designed not to protect the content of utterances but to protect the speakers themselves from any conceivable criminal charge with respect to the intent, the purpose, the motivation or the substance of legislative utterance. *Kilbourn* in 1881 and *Tenney* in 1951 rejected the contention of the government that the Speech and Debate provision should be narrowly interpreted, the Supreme Court holding that it applied not only to utterances in the Congress but to all official acts there.

The decision of the Fourth Circuit invalidating the conspiracy charge under the Speech and Debate clause is confirmed by the historic interpretation accorded the separation of powers doctrine. Since *Fletcher v. Peck*, in 1810 it has been held without qualification that under the separation of powers doctrine the judiciary may not inquire into the motives of members of the legislative branch of the government with respect to their official acts.

There is no valid basis for the distinction asserted by the government between an antecedent criminal agreement to make a speech in the Congress and the content of speech concededly protected by the Speech and Debate clause. Even if this Court accepted in principle that distinction, the conspiracy charge here did necessarily involve the content of Mr. Johnson's speech and required an inquiry into its substance. A searching inquisition was conducted

into the motivation, the source of material, the preparation, the substance and use of the speech.

The content of speech in the Congress and a criminal charge of conspiracy as to its motivation are not separable, for no words are spoken or written without purpose. The early decision in *Strode's* case in 1512 and the resultant Strode's Acts of 1521 and 1667 as well as the decision of the Queen's Bench in *Ex parte Wason* in 1869 repudiate the government's new found distinction. Practical considerations disclose that a conspiracy charge and the content of a speech are inseparably linked and point up the lack of reality in the government's argument that a prosecution would lie if the speech were not delivered. The Speech and Debate provision would be emasculated if the government's restrictive contention could be accepted.

The validity of the federal bribery statute (18 U.S.C. Sec. 205) is not involved in this case because Mr. Johnson was not and could not have been charged with violating it or conspiring to do so as that statute carefully refrains from including speech or debate in the proscribed conduct; it was limited to official action and vote with respect to pending matters; Mr. Johnson's speech had no relation to any matter pending in the House of Representatives. We also show that the other contentions of the government are without merit.

To sustain the conspiracy charge the Court must find that in enacting the conspiracy statute (18 U.S.C. Sec. 371) in 1867 Congress intended that its defrauding provision, i.e., conspiracy to defraud the government, should apply to a conspiracy relative to a speech in the House of Representatives. Such an intention was rejected by this Court in *Tenney* under a comparable 1871 federal civil conspiracy statute and the reasoning of the Court there is

even more applicable here. Such an intention was also implicitly denied in *United States v. Gradwell*, 243 U.S. 476 (1917) where the Court held that the defrauding part of the same conspiracy statute involved here was not intended by the Congress to apply to the bribery of voters in elections of members of the Congress.

The indefinite nature of the conspiracy charge violated the Defendant's Fifth and Sixth Amendment right that the indictment clearly inform him of the offense charged because the charging provision of the indictment, namely, paragraph (14) (App. 4, 5), declares the unlawful objects of the conspiracy in terms so broad as to be beyond comprehension. The alleged purposes of the conspiracy are so vague, general and indefinite the government could have offered in evidence in support of the charge testimony as to any and all conduct of any defendant with respect to any matters pending before any administrative department of the government or in the House of Representatives. The indefinite charge constituted the most conspicuous confirmation of the dangers of conspiracy procedure described by this Court in *Grunewald*, *Krulewitch*, and *Kotteakos*.

This Court should repudiate the all-embracing concept of Section 371 as interpreted by Chief Justice Taft for this Court in *Hammerschmidt v. United States*, 265 U.S. 182 (1924) where the Court defined "conspiracy to defraud" as including "e obstruction of lawful governmental functions by "dishonest means" or "overreaching." These elegant words afford no standard for the application of the command of the statute. Such words have no more meaning in law than "sinful" or "wicked" or "unethical". They merely express whatever happens to be current notions of unethical or "bad" conduct, and such vagaries do not meet contemporary Sixth Amendment standards.

In Part Two of the Argument, which unavoidably lengthens the Brief, we show that, contrary to the opinion below, a fair retrial on the substantive counts requires that Johnson have access to the grand jury transcript when the government was allowed to breach "the seal of secrecy" by permitting a potential government witness and his counsel to read a volume of the grand jury testimony before trial in violation of Rule 6(e) of the Federal Rules of Criminal Procedure. The American Bar Association has recommended to the Judicial Conference of the United States that after indictment there should be a disclosure of grand jury minutes. The time has come to stop exalting "secrecy for secrecy's sake."

The District Court and the Fourth Circuit erroneously held that the original interview notes of FBI agents as to what was said to them by a defense witness and a co-defendant did not constitute Jencks Act material and therefore were not producible. This holding would seem to be in violation of *Clancy v. United States,* 365 U.S. 312 and concessions by the Solicitor General in 3 recent cases.

The policy of the FBI in requiring that original interview notes be destroyed is a plain effort to circumvent the *Jencks* decision as well as the Jencks Act and should come under the sanction of the Act, namely exclusion of the FBI agents testimony.

Johnson was denied a requested instruction on a crucial issue under the substantive counts, namely, that to convict, the jury must find that Johnson knew and understood that the checks he received constituted compensation for his visits to Justice. Actual intention not constructive intention was a prerequisite to guilt. The Court's instructions as to Johnson's knowledge and intent were ambiguous and contradictory.

PART ONE
THE CONSPIRACY CHARGE WAS UNLAWFUL

I

THE SIGNIFICANCE OF UNRESTRAINED LEGISLATIVE SPEECH IN THE LIGHT OF THE AMERICAN COMMITMENT TO FREE SPEECH.

The Speech and Debate clause of the Constitution, which has only been before this Court on two occasions *(Kilbourn* and *Tenney)*, cannot be considered insulated from the teachings of this Court with respect to the general First Amendment right of freedom of speech.

1. Merely labeling a charge "criminal conspiracy" gives no immunity from the constitutional protection of the First Amendment. As this Court said in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964):

> "In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. *N.A.A.C.P. v. Button*, 371 U.S. 415, 429, 9 L. ed. 2d 405, 415, 83 S. Ct. 328. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel [and likewise conspiracy] can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[8]

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[8] In sustaining an Illinois criminal libel statute in *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952), this Court was careful to note that the Court "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel."

2. "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[9] "The opportunity should be afforded for 'vigorous advocacy' no less than 'abstract discussion.' "[9a] "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.[10] ". . . [E]rroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they "need . . . to survive."[11] In applying constitutional limitations to a charge of criminal contempt this Court has said "such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice."[12]

This Court has repeatedly struck down statutes because they might have a deterrent effect on the exercise of First Amendment freedoms. A flat license tax upon the exercise of First Amendment rights was declared unconstitutional in *Murdock v. Pennsylvania,* 319 U.S. 105 (1943). A registration requirement imposed on a labor union organizer before making a speech met the same fate in *Thomas v. Collins,* 323 U.S. 516 (1944). A municipal li-

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[9] *Bridges v. California,* 314 U.S. 252, 270 (1941).

[9a] *N.A.A.C.P. v. Button,* 371 U.S. 415, 429 (1963); *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964).

[10] *New York Times Co. v. Sullivan,* p. 270; *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949); *DeJonge v. Oregon,* 299 U.S. 353, 365 (1937).

[11] *New York Times Co. v. Sullivan,* p. 271.

[12] *Bridges v. California,* 314 U.S. 252 (1941); *Craig v. Harney,* 331 U.S. 367 (1947); *Wood v. Georgia,* 370 U.S. 375 (1962). In *Bridges* the criticism referred to was criticism of a judge or his decision.

censing system for the distribution of literature, *Lovell v. Griffin*, 303 U.S. 444 (1938); a denial of a tax-exemption to proponents of certain viewpoints, *Speiser v. Randall*, 357 U.S. 513 (1958); a book obscenity law which did not require *scienter* by the book seller as tending to cause a self-imposed restriction of free expression, *Smith v. California*, 361 U.S. 147 (1959); and a federal postal service act requiring an addressee in order to receive his mail to request in writing that it be delivered, *Lamont v. Postmaster General*, 14 L. Ed. 2d 398 (1965), were deemed to abridge freedom of speech because they were likely to have a deterrent effect.

As Mr. Justice Douglas said for the Court in *Lamont* "the regime of this Act is at war with the 'uninhibited, robust and wide-open' debate and discussion that are contemplated by the First Amendment." "But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."[13] In no event may an intrusion on First Amendment rights be sustained on the ground that the intrusion was only a minor one.[14]

3. If a charge of criminal conspiracy with respect to the motivation or purpose of a speech made in the House or the Senate on the ground that it is venal or unethical were sustained, serious inhibitions with respect to speech, debate and discussion there would follow. As the Fourth Circuit well said in this case:

"A practical reason exists for invoking the congressional privilege, which meets the objective of the

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[13] *Lamont*, 14 L. Ed. 2d 403, concurring opinion of Mr. Justice Brennan; *Freedman v. Maryland*, 380 U.S. 51 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

[14] *Lamont*, 14 L. Ed. 2d 404; concurring opinion of Mr. Justice Brennan; *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> constitutional provision. The design is to promote the independence of all congressmen. To avoid restraint on free expression on the floor of either House, protection is given against the hazard and harassment of inquiry in any court. It is no answer, therefore, to say that if the accused member is innocent of accepting a bribe he has nothing to fear. A groundless charge [criminal indictment] may be sufficient to destroy him at the polls. Moreover, the process of indictment by a grand jury and inquiry in a court may itself be so devastating that an innocent congressman may well fear it." 337 F.2d at 191.[15]

A member of the House of Representatives must of necessity rely heavily on gifts in the form of political campaign contributions to finance the constantly rising costs of his political campaigns requiring access to the various forms of mass communication media. This, as well as an awareness that a Congressman may be swept out of office at any election, has made it mandatory for those without independent means to retain outside economic interests or continue their business or profession.[16] These

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[15] See also note on *Johnson v. United States*, 78 Harv. L.R. 1473 (1965).

[16] The Association of the Bar of the City of New York (Manning, ed.) (1960) *Conflict of Interest and the Federal Service.*, pp. 13-16. "In fundamental respects, however, the congressional problem differs from that of the executive. It is too easy to say glibly that rules governing the administrator should govern the legislator. The Congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry—though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would

facts of political life suggest that a power of the executive to indict a Congressman on the ground that a political campaign contribution or income from an outside business source was the *true* motivation for a speech he delivered in the halls of Congress would be a very great power indeed.

For a Congressman ". . . to decide at what point and on which issue he will risk his career is a difficult and soul searching decision."[17] To give the executive branch this weapon it seeks to wield against speech in Congress would create a substantial obstacle to the exercise of courage by a legislator. If the executive branch is given such a power of intimidation, it would gain a club to hold over the head of each member of the Congress who has spoken out in favor of a cause where the proponents of that cause have either contributed to his campaign or employed him in a professional capacity. Such a deterrent to the exercise of free speech in the Congress should not be countenanced.

Thus, the acceptance of a gift or a political campaign contribution by a member of Congress is not inherently unethical or dishonest even if it bears some relationship to an innocent act such as a speech. Speeches made with the

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prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government.

"Furthermore, no member of Congress can subsist on his government salary. Forced to keep his base and to spend time in his home district, he unavoidably incurs heavy and regular travel expenses. Campaign costs soar as campaign techniques turn to mass communication media. And the congressman must always be prepared to sail on the next ebb of the political tide. These facts, taken together with the myth that membership in Congress is still a part-time job, ensure that congressmen will keep up their outside economic connections, and that they will insist upon the necessity and justice of their doing so."

[17] Kennedy, *Profiles in Courage* (1955, p. 12).

hope and even the immediate prospect of campaign contributions must be numberless. Undoubtedly there have been innumerable instances of Senators and Representatives who have espoused causes and received some related compensation in an infinite variety of forms, i.e., presidential patronage, promises of political support and political contributions. It must be remembered that a member of Congress is answerable for any impropriety in his conduct both to the Congress and to his electorate.

If such a charge can be leveled at a member of the Congress, then the investigative apparatus of the executive power can proceed to inquire into the motivation of any speech made in the Senate or House. Agents of the Federal Bureau of Investigation may intrude themselves into the halls of the Congress and the Senate and House Office Buildings, interview the staff personnel of members of Congress, contributors to Congressional campaigns and others—all for the purpose of ferreting out whether an utterance in the Congress was made, or influenced, by improper or unethical or dishonest motives. Such an investigation, without more, should be deemed an intolerable affront to the privilege of freedom of speech in the Congress.

If such a conspiracy charge were constitutionally permissible, before exercising his right of freedom of speech it might be incumbent upon a prudent member of the Congress to seek and obtain an opinion of the Attorney General that his proposed speech would be permissible and would not violate the conspiracy statute. Such a potentially all embracing, all pervasive restraint upon the right of freedom of speech within the very halls of Congress would be intolerable and irreconcilable with the numerous teachings of this Court. In the area of free speech, conduct may not be restricted "to that which is

unquestionably safe."[18] ". . . the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times Co. v. Sullivan*, p. 278. As Judge Learned Hand carefully explained in his discussion of the balance of values involved in such a situation "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant threat of retaliation."[19]

As the Fourth Circuit pointed out in its opinion (p. 191) the possibility of ultimate vindication from such a charge in a court proceeding by a member of Congress is no substitute for the guarantee held out by the Constitution. Fear of a charge by indictment and subsequent trial may be itself so devastating that the most innocent Congressman would necessarily dread such an occurrence to the point where he would suffer silently rather than risk such public humiliation.[20]

4. Freedom of speech and debate in the Senate and House of Representatives has been a cherished tradition of our constitutional history. However highly valued the right of freedom of expression elsewhere may be,[21] that right of the elected representatives of the people within the walls of the Congress has an even greater claim to immunity from restraint. Legislative liberty involves lit-

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[18] *Baggett v. Bullitt*, 377 U.S. 360 (1964).

[19] *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

[20] In spite of Johnson's presumption of innocence, it is evident that his indictment 3 weeks before his election occasioned his defeat. See footnote 2.

[21] The Constitutional safeguard "was fashioned to assure unfettered interchange of ideas or the bringing about of political or social changes decided by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

tle more than the right to speak in a legislative body without restriction, restraint or inhibition. Indeed the concept of legislative liberty has been deemed the very basis of our governmental system and all other privileges. "The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual." Story, *Commentaries on the Constitution*, (5th Ed. 1891) Vol. I, p. 630. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators."[22]

Freedom of speech outside of the halls of Congress may be subject to an exercise of the police powers, including valid obscenity laws and valid libel and slander laws, but it is submitted that the tradition of legislative liberty is so central to our constitutional heritage that it is subject to no restraints or inhibitions by the executive power. The only appropriate restraint is that provided by the Constitution—the disciplinary power of each House. Free speech and debate are important in Los Angeles, California, and Savannah, Georgia, but the uniqueness of the Congressional forum with its potential for immediate and vital impact on the entire nation entitles speech there to special protection. This Court should be especially hesitant to threaten an outlet for speech where there is *no alternative outlet* with the same potential for impact as that threatened.

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[22] *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

II

THE SPEECH AND DEBATE PROVISION OF ARTICLE I, SECTION 6, OF THE CONSTITUTION DENIED THE EXECUTIVE AUTHORITY TO BRING, AND THE DISTRICT COURT AUTHORITY TO HEAR, THE CONSPIRACY CHARGE CONTAINED IN COUNT ONE OF THE INDICTMENT.

By pretrial motion Johnson moved to dismiss the conspiracy charge of the Indictment upon the ground that it violated the provision of Article I, Section 6, of the Constitution, that "for any speech or debate in either House they (members of Congress) shall not be questioned in any other place". The District Court denied the motion on the ground that the constitutional provision only applied in civil and criminal prosecutions for libel, slander, treason and sedition, and therefore the Constitution did not bar a criminal prosecution charging a conspiracy by a member of the Congress to make a speech in either House for profit[23] (App. 55).

In the unanimous opinion by Chief Judge Sobeloff, the Fourth Circuit reversed Johnson's conviction. The Court's language is instructive (337 F.2d 189-190):

> "Inevitably, the indictment required an inquiry into Johnson's reason for delivering the speech the very inquiry which the Supreme Court has explicitly declared to be beyond a court's power. *Tenney v. Brand-*

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[23] At the conclusion of the Government's testimony and at the conclusion of all the evidence, the District Court also denied motions of Johnson for judgments of acquittal under the First Count of the Indictment. These motions asserted that the *evidence* submitted by the Government questioned speech or debate in the House of Representatives and therefore violated the constitutional prohibition. See also Johnson's motion for a new trial and in arrest of judgment (App. 973).

hove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951). The contents of the speech as such were not challenged. In fact the indictment attacked only the purpose for which the speech was made, i.e., 'to defraud the United States.' To prove this, however, the speech in its entirety was introduced into evidence and was commented upon extensively by the prosecution during the trial and in the closing arguments. Since Johnson could not deny making the speech it naturally became necessary for him to demonstrate that his purpose for delivering it was good. But the Supreme Court has declared in Tenney that '(t)he claim of an unworthy purpose does not destroy the privilege.' 341 U.S. at 377, 71 S. Ct. at 788. The speech was more than an incidental feature of the conspiracy charged. Fully one-half of the testimony introduced at the trial related to the speech.

"Federal cases discussing the privilege have repeatedly held that the good or bad faith of the member making the speech is immaterial. Indeed this is precisely the teaching of *Tenney.* In *Cochran v. Couzens,* 42 F.2d 783 (D.C. Cir.) cert. denied, 282 U.S. 874, 51 S. Ct. 79, 75 L. Ed. 772 (1930), for example, the complaint alleged that a Senator '(m)aliciously, wilfully, falsely and wrongfully' delivered a 'scandalous, malicious and defamatory slander' in a speech on the floor of the Senate. In affirming the District Court's dismissal of the complaint, the court held that 'the words forming the basis of plaintiff's action were uttered in the course of a speech in the chamber of the Senate of the United States and were *absolutely privileged* and not subject to 'be questioned in any other place.' " 42 F.2d at 784 (Emphasis added.).

It is submitted that at the threshold of this case in denying the motion to dismiss, the District Judge violated a clear, unambiguous declaration of the Constitution because the allegations of the conspiracy charge with respect to Johnson's speech in the House of Representatives did

plainly question "speech or debate" "in any other Place"; that there is no legal authority in the United States, and none in England since the Bill of Rights of 1689, in support of the drastic limitation the District Judge attempted to write into the constitutional provision; that his restriction was in conflict with two Supreme Court decisions and disregarded numerous other Supreme Court decisions that, under the separation of powers principle, the judiciary may not inquire into the motives of members of the Congress as to their official acts; and that the District Judge struck a crippling blow at an ancient and cherished principle of constitutional liberty.

A.

The Allegations of the First Count

The First Count charged in Paragraph (14) a conspiracy of the Defendants to defraud the United States of (1) the faithful services of Congressman Johnson and Congressman Boykin in the conduct of their official duties and of (2) the faithful services of the administrative officers of the United States, including the officials of the Department of Justice.

Paragraph (14) (d) of the First Count charged that the Defendants conspired to deprive the Government of the faithful services of Johnson and Boykin in their official capacity as members of the Congress, uninfluenced by corruption and uninfluenced by money payments to them by the other Defendants "as compensation for services rendered and to be rendered by said Thomas F. Johnson in behalf of the said other Defendants . . . in relation to matters pending in the House of Representatives . . . " (App. 5). Paragraph (15) asserted that it was a part of the conspiracy that this Defendant should, at the request of Defendants Edlin and Robinson, render

services for compensation by making of a speech defending the operation of Maryland savings and loan associations on the floor of the House of Representatives (App. 5, 6). Paragraph (16) alleged that it was a part of the conspiracy that Defendants Johnson, Edlin and Robinson did cause to be reprinted copies of the speech for distribution to the public at large, etc. (App. 6).

Overt Act (1) claimed Edlin, Robinson and Johnson met and discussed the contents of the proposed speech to be given by Johnson on the floor of the House of Representatives (App. 9). Overt Act (2) claimed that Robinson and others prepared drafts of the proposed speech (App. 9). Overt Act (3) charged that Johnson received a check for $500.00 from Robinson, implying that this sum constituted compensation for the making of said speech (App. 10). Overt Act (4) alleged that on June 30, 1960, Johnson delivered a speech on the floor of the House of Representatives. Overt Act (5) refers to a check for $168.91, of First Continental Savings and Loan Association, payable to this Defendant, implying that it was received in connection with said speech.[24] Overt Acts (6) and (7) (App. 10) charged that this Defendant directed the reprinting of copies of the speech delivered on the floor of the House of Representatives on June 30, 1960.

B.

The Constitutional Provision and Its Ancient Lineage in the History of Constitutional Liberty

The principle embodied in Article I, Section 6 of the Constitution was not fully established in British Parlia-

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[24] The evidence showed that Johnson endorsed this check to the Public Printer in payment of reprints of his speech which his office ordered for a State Savings and Loan Institute.

mentary history until the Bill of Rights of 1689. Hereafter there are reviewed the land-marks of the great struggle between the House of Commons and the Crown finally resulting in the establishment of the principle of liberty as to speech and debate in Parliament. That history demonstrates clearly that the speech and debate provision of the bill of Rights was designed to preclude the Crown from making any criminal charge with respect to the motivation or content of legislative speech.

At the Federal Constitutional Convention the pertinent clause of Article I, Section 6, was adopted without opposition. Only two proposals with respect to the provision were offered and these were not accepted. William Pinkney proposed that it be provided that each House should be the sole arbiter of the privilege. Madison advocated that the extent of the privilege should be delineated.[25] It will be found that the Constitution of almost every state of the Union and almost every foreign democratic nation now contains a constitutional provision that speech and debate in its Congress or Parliament may not be questioned or impeached elsewhere.[26] Thus its great principle has achieved an almost universal acceptance.

C.

In Sustaining the Conspiracy Charge of the Indictment The District Court Violated the Letter and the Spirit of the Constitutional Provision

The concise Constitutional Declaration that "for any speech or debate in either House they [members of Con-

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[25] Butzner, Constitutional Chaff, p. 47.

[26] For example see the Constitutional provisions of Argentina, Art. 61; Belgium, Art. 4; Czechoslovakia, Sect. 44; France, Art. 21; Ireland, Art. 15, Paragraph 13; Italy, Art. 68; Japan, Art. 5; Luxembourg, Art. 68; Netherlands, Sec. 100; Peru, Art. 104 and Portugal, Sec. 89(a).

gress] shall not be questioned in any other place" is clear and unambiguous. It is absolute in its categorical imperative. The clause does not grant an authority to the Congress with respect to Speech and Debate. It assumes the power and denies any authority to the executive or the judiciary in this limited area. It admits no qualification; it concedes no exception. The principle proclaims the exclusive authority of the House and Senate to inquire into the propriety or legality of speech and debate within their chambers. They, and they alone, may charge, hear, acquit, convict or impose sanctions with respect to such matters. The constitutional principle contests no power of the Congress; it admits and reaffirms the power. Although usually referred to as "a privilege", it is a complete denial of any power or authority to the executive and to the judiciary in the area of speech and debate in the House of Representatives and the Senate.[27]

Section 2 of the Third Article of the Constitution provides that the judicial power shall extend to all cases in law and equity arising under the Constitution and the Laws of the United States, etc. The authority and powers of the Federal Courts stem, therefore, from the Constitution and, in making this grant of judicial power, the Constitution, the source of that power, carefully denied to the courts any authority in the area of speech and debate in the Congress.

The scope of the Constitutional prohibition depends upon the meaning of the word "question", particularly as it was used in 1789. Clearly the draftsmen of the Constitution used the word to mean "impeach" or "inquire into" or "to be the foundation of any accusation or prosecution, action or complaint".

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[27] "The privilege is absolute. The purpose, motive or the reasonableness of the conduct is irrelevant." Judge Youngdahl in *McGovern v. Glenn Martz and Washington News Syndicate,* 182 F. Supp. 343, 346 (D.C. D.C. 1960).

The Bill of Rights of 1689 stated that speech, or proceedings in Parliament debate "ought not to be impeached or questioned in any court or place out of Parliament." The Declaration of Rights of 1776 of Maryland provided that "speech and debate ought not to be impeached in any other court or judicature". The Bill of Rights of 1780 of the State of Massachusetts and the Constitution of New Hampshire declared that speech and debate "cannot be the foundation of any accusation or prosecution, action or complaint, in any other Court or place whatsoever". There can be no distinction in meaning between the concise language of the Declaration in the Federal Constitution and the broader language of the earlier English Bill of Rights and of the Maryland, Massachusetts and New Hampshire Constitutions. All had their source in the same historic struggle for freedom of speech in the legislative branch of Government; all were directed to the same end, to assure that freedom. In *Kilbourn* (p. 203) the Supreme Court quoted the provision of the Bill of Rights of Massachusetts, its evident purpose to make clear that, although the Massachusetts provision was broader than the concise declaration of the Federal Constitution, in meaning they were synonymous.

1. Acceptance of the Government's contention would mean that the constitutional prohibition should be narrowly interpreted to insure that it does not protect alleged criminal conduct with respect to speech or debate in the Congress. Yet, this great constitutional privilege has been universally interpreted liberally to achieve its fundamental purpose and never before has any American court attempted to qualify, condition, or limit its full constitutional scope. This principle was expounded in *Coffin v. Coffin,* 4 Mass. 1, 27 (1808) recognized as the

leading authority on Speech and Debate by this Court in *Kilbourn v. Thompson*, 103 U.S. 168 (1881) which repeated the canon of liberal construction.

Tenney v. Brandhove, 341 U.S. 372, 377, involved the charge that members of a California Legislative Committee had violated a civil conspiracy law of the United States. The Court rejected the contention of the Government that the constitutional privilege did not extend to an accusation that legislative conduct was done for a dishonest purpose or in violation of a federal law. The Court said (p. 377):

> "The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."

2. The District Court and the Government disregard the fact that the constitutional prohibition also applies to the allegations as to the reprinting and republishing of the Johnson speech. The Court may take judicial notice that all speeches made in the House or the Senate are printed in the Congressional Record and duly published as a House or Senate document and made accessible to the public. Thus the publication of the legislative proceedings is done under the authority of the Congress. Any speech embodied in the Congressional Record becomes a public document. Public documents may be reprinted by the public printer by order of any member of Congress on prepayment of their cost. 44 U.S.C. Secs. 71, 72, 79, 82, 162, 163 and 185.

It was under these statutory provisions and the rules of the House that Johnson, as a member of the House, ordered printed copies of his speech for distribution. Since the reprinting of a public document contained in the Congressional Record is done under the authority of the Congress, that reprinting and republication are within the constitutional immunity. *DeArnaud v. Ainsworth*, 24 App. D.C. 167, 5 L.R.A. (N.S.) 174, *Wason v. Walter*, 4 Q.B. 73, 85 (1868).[28]

3. The decision of the Fourth Circuit interpreting the Speech and Debate clause is confirmed by the historic interpretation accorded the separation of powers doctrine. As long ago as 1810, Chief Justice Marshall, on behalf of the Supreme Court, declared in *Fletcher v. Peck*, 6 Cranch 87, 130 (without reference to Article 1, Section 6, of the Constitution), that the judiciary was not competent to inquire into the motives of the members of the legislative branch of the Government in enacting legislation or whether they acted corruptly or with self-interest or under undue influence. He even went so far as to say, "If the majority of the Legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct." (p. 130).

Since *Fletcher v. Peck*, the principle that the judiciary may not question the motives of members of the Congress has been deemed fundamental under the separation of powers doctrine. *Arizona v. California*, 283 U.S. 423, 455 (1931); *Hearst v. Black*, 87 F.2d 68, 72 (C.A. D.C. 1936); *Townsend v. United States*, 95 F.2d 352 (C.A. D.C. 1938); *Eisler v. United States*, 170 F.2d 273, 279 (C.A. D.C. 1948); *Barsky v. United States*, 167 F.2d 241, 250

[28] See the note by Bigelow (editor) pp. 631-32, Story, Commentaries Vol. I (5th Ed. 1891).

(C.A. D.C. 1948). The vitality of the principle was reiterated by the Supreme Court as recently as 1950 in *Tenney* where the Court reaffirmed the holding of *Fletcher v. Peck,* (p. 377) "that it was not consonant with our scheme of Government for a court to inquire into the motives of legislators, has remained unquestioned." The government has been unable to reconcile its position in this case with these landmark cases.

4. Mr. Justice Story was undoubtedly correct when he wrote in his *Commentaries on the Constitution,* Vol. I, p. 630 (5th Ed. 1891):

> "The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belong to the legislation of every State in the Union as matter of constitutional right."

D.

History of the Development in England of the Principle of Liberty of Speech and Debate in Parliament Confirms the Invalidity of the Conspiracy Charge

In the Fifteenth, Sixteenth and Seventeenth Centuries the first order of business of a new House of Commons was a petition to the Crown that it recognize for the duration of the House the ancient privileges of the House, including the right of free speech.[29] These petitions implicitly assumed that Parliamentary privileges were a matter of grace subject to grant and limitation by the Crown.

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[29] The History of English Parliamentary Privilege, p. 23, Carl Wittke, Ohio St. Univ. 1921.

The first significant claim that a legislator could not be punished by reason of legislative speech occurred in 1455 in the case of Thomas Yonge (Young), one of the "knights for the shire and town of Bristol." He complained to Commons that he had been arrested for a motion made by him in Commons concerning the descent of the throne. As the government correctly states (Gov't Brief, p. 20) the importance of his petition for relief was the novelty at that time of his claim that members of Commons by their ancient liberty "ought to have their freedom to speke and sey in the Hous of their assemble, without eny maner chalange, charge or punycion therefore to be leyde to theyme in eny wyse.[30]

Under Henry VIII the Commons began to articulate its privileges, at first hesitantly but later with increasing vigor and reliance upon precedent.

In 1512 under Henry VIII Richard Strode, a member of Commons, was prosecuted by the Crown in its Courts and fined and imprisoned for allegedly having a financial interest in a bill to regulate certain abuses connected with the tin industry. On a petition by Strode to the Parliament an act was passed in 1521 annuling his conviction and providing that in the future all suits and charges that might be brought against him and others for any bill, speaking, reasoning, declaring or any matter concerning the Parliament to be communed and treated be considered void. Section 2 of Strode's act provided that, "Sutes, accusementes, condempnacions, execucions, fynes, amercramentes, punysshmentes, correccions, greivances, charges and imposicions, put or had or hereafter to be put or hadde unto or uppon the said Richard, and to every other of the person or persons afore specified, that nowe be of this present

[30] Note 4 Henry VII, Ch. VIII. See also I Hatsell, 86.

parliament, or that of any Parliament hereafter shalbe for any bill, spekyng, reasonyng, or declaryng of any mater or maters concernyng the parliement to be commended and treated of, be utterly voyd and of none effect." VI Holdsworth, 98.

For a century a dispute raged whether this comprehensive enactment was a private or a public act; in 1629 the judges declaring it a private act applying only to Strode's case, but the Parliamentarians in the struggle with Charles arguing that it was a public bill applicable to all charges and suits after its enactment.[31] Significantly Parliament declared even then that a criminal charge as to the alleged dishonest motives of a member in introducing a bill violated the legislative privilege.

Elizabeth I imprisoned members of the Commons for words spoken in that House although Holdsworth states that "Strode's act was really decisive that it was not legal."[32]

In 1576 during the reign of Queen Elizabeth, Peter Wentworth made his great speech in the House of Commons and there for the first time the claim was made that freedom of speech had a fundamental, entrenched place in the Constitution, entirely removed from its historic status as a privilege dependent upon the grace of the Crown and subject to definition by it.[33] Among other things Wentworth said:

> "Mr. Speaker, I find written in a little volume these words in effect: 'Sweet indeed is the name of liberty and the thing itself a value beyond all inestimable

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[31] *Histroy of English Parliamentary Privilege*, p. 25.

[32] VI Holdsworth, p. 98; IV Holdsworth, p. 179.

[33] Elizabeth I and Her Parliaments, p. 321, J. E. Neale (Jonathan Cape, 1953).

treasure.' So much the more it behoveth us to take heed lest we, contenting ourselves with the sweetness of the name only, do not lose and forgo the value of the thing. And the greatest value that can come unto this noble realm . . . is the use of it in this House . . .

"I was never of Parliament but the last and the last session (i.e. 1571 and 1572), at both which times I saw the liberty of free speech, the which is the only salve to heal all the sores of this Commonwealth, so much and so many ways infringed, and so many abuses offered to this honorable Council . . . that my mind . . . hath not been a little aggrieved . . . Wherefore, to avoid the like, I do think it expedient to open the commodities that grow to the Prince and whole State by free speech used in this place . . ."

* * *

"I conclude that in this House, which is termed a place of free speech, there is nothing so necessary for the preservation of the Prince and State as free speech, and without it it is a scorn and mockery to call it a Parliament House, for in truth it is none, but a very school of flattery and dissimulation, and so a fit place to serve the Devil and his angels in and not to glorify God and benefit the Commonwealth . . ."

* * *

"Free speech and conscience in this place are granted by a special law, as that without the which the Prince and State cannot be preserved or maintained."

* * *

"It is a great and special part of our duty and office, Mr. Speaker, to maintain freedom of consultation and speech . . . I desire you from the bottom of your hearts to hate all messengers, tale-carriers, or any other thing, whatsoever it be, that any manner of way infringe the liberties of this honourable Council. Yea, hate it or them, I say, as venomous and poison unto our Commonwealth, for they are venomous beasts that do use it."

It has been said that this was the most remarkable speech hithertc conceived in the Parliament of England. "No one—at least, we know of no one—had previously thought these questions fearlessly through to the simplicity and clarity of Peter Wentworth's conclusions. He was wrong, utterly wrong in his own generation; but the future hallowed his doctrine. He, indeed, as much as any of his colleagues, shaped that future."[34]

When Wentworth was called to account by a committee appointed by the House, including all Privy-Councillor Members and other officials, and interrogated as to his motives in using abusive language with respect to Queen Elizabeth, he took the position that, if the committee was acting on behalf of the Crown, he would refuse to answer any questions because they had no right to interrogate him; but, if they were acting as a committee of the House, they had such authority and he would willingly answer.[35] Wentworth was convicted and imprisoned in the Tower.

If many members of the House of Commons were creatures of the Crown, if a majority was often too readily intimidated, if Wentworth was only feebly supported, there were some "who with patient resolution and inflexible aim recurred in every session to the assertion of that one great privilege which their soverign contested, the right of Parliament to inquire into and suggest a remedy for every public mischief or danger" IV Holdsworth 180. In each of the Parliaments of 1584, 1585, 1586, 1587 and 1588 a committee of the House was appointed to bring to the notice of the House cases of the breach of their privileges there. Holdsworth suggests that this was a "significant sign of the times" and "the importance of safeguarding

[34] Elizabeth I and Her Parliaments, p. 325.

[35] Elizabeth I and Her Parliaments, p. 326.

of the privilege of freedom of speech was never lost sight of.[36]

It is not surprising to find that the earliest controversies between James I and his Parliaments turned upon questions of privilege, and these questions were in the forefront of the constitutional controversies all through this period.[37]

In James I's first Parliament in 1604 the House of Commons laid it down in clear terms that the privileges of Parliament were as much their "undoubted right," as the right of property which every subject had in his lands or goods; and that these privileges being necessary for the conduct of the business of the House, they could not be "withheld, denied, or impaired, but with apparent wrong to the whole estate of the realm."[38]

When James thereafter imposed custom duties without parliamentary consent, commanding Commons not to challenge the Crown's prerogative in this matter, Commons responded that it was "an ancient, general, and undoubted right of Parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved."

Neither James I nor Charles I would admit the truth of this view as to the nature and basis of Parliamentary privilege. In 1621 James I told the House of Commons that in his opinion these privileges were not their ancient and undoubted right, but on the contrary, were derived "from the grace and permission of himself and his ancesters"; "for," he said, "most of them grow from

[36] VI Holdsworth, 179, 180.
[37] VI Holdsworth, p. 93.
[38] VI Holdsworth, p. 93.

precedents, which shows rather a toleration than inheritance." Further, he warned that if they persisted in trenching upon his prerogative, he would be forced to trench upon their privileges.[39]

The House of Commons lost no time in contradicting James in the most decided way. Its famous Protestation of 1621 ran as follows:

> "The testation following: that the liberties, franchises, privileges, and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the king, state, and defence of the realm, and of the church of England, and the maintenance and making of laws, and redress of mischiefs and grievances which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses *every member of the House of Parliament hath and of right ought to have freedom of speech, to propound, treat, reason, and bring to conclusion the same: and that the Commons in Parliament have like liberty and freedom to treat of these matters in such order as in their judgments shall seem fittest: and that every member of the said House hath like freedom from all impeachment, imprisonment, and molestation (other than by censure of the House itself) for or concerning any speaking, reasoning, or declaring of any matter or matters touching the Parliament, or Parliament business . . .*". (Emphasis added.)

James was so enraged at this protestation that he sent for the Journals of the House of Commons, and tore it out with his own hand.

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[39] Chrimes, *English Constitutional History* (1953) 144-145; Letter of the King, Dec. 1621, Prothero, Documents, 313; VI Holdsworth, p. 93.

In 1629, by Order of Charles I, Sir John Eliot, Denzil Holles and Benjamin Valentine, members of the House of Commons, were prosecuted in the Court of Kings Bench, after Parliament's dissolution, for speeches made in the House which the Crown deemed criminal and seditious. The accused pleaded to the jurisdiction of the Court, maintaining that the offense, if any, had been committed and was punishable only in Parliament and not elsewhere. "Words spoken in Parliament . . . cannot be questioned in this court * * *."[40] The King's Bench convicted the members of the House and imprisoned them, Judge Sir William Jones observing: "We are the judges of their lives and lands; therefore of their liberties."[41] Eliot died from the effects of his imprisonment in the Tower.

In a MS. speech written by Eliot for a Parliament, which he did not live to see (Forster, Life of Eliot, ii 445-448) he wrote at p. 466, "Now the whole power and virtue of Parliament depends upon the privileges thereof. Her ancient franchises and immunities are that which has sustained her. A Parliament without liberty is no Parliament." In 1640 members of the Commons were questioned by the Privy Council as to their legislative conduct and imprisoned for their refusal to reply. Macaulay, *I History of England*, p. 96 (Lovell, Ed.).

The decision of the King's Bench in the Eliot case contributed greatly to the growing opposition to Charles, and the Commons never forgot this unwarranted invasion of their privileges. In 1641, the earliest opportunity they had, the Commons adopted resolutions declaring these entire proceedings against their members a breach of Parliamentary privilege. The Civil War prevented further action but after the Restoration, the

[40] 3 Howell, State Trials, 296.
[41] 3 Howell, St. Tr. 306.

case was reopened and on November 12, 1667, the House of Commons, to remove all possibility of misunderstanding in the future, adopted a resolution declaring Strode's Act of 1521, attempting to guarantee freedom of legislative speech and action, a general law declaratory of the "ancient and necessary rights and privileges of Parliament."[42] On November 23, 1667, the Commons declared the specific judgments against Eliot and the other members illegal and breaches of privilege, and later the Lords ordered the judgment of the King's Bench reversed.

In 1642 Charles I sent his Attorney General to charge Pym, Hollis, Hampton and other members of the House with high treason in the House of Lords and Charles went in person with armed men to arrest them in Parliament. This action of the Crown was caused by legislative acts and utterances, including a remonstrance of the Commons in November 1641 enumerating the faults of the Charles Administration. I Macaulay p. 107. It triggered the Civil War. After the Restoration the principle of legislative liberty was so established that Charles II did not dare to attack it directly; his men did mutilate Sir John Coventry for his utterances. I Macaulay p. 191.

Immediately after the Revolution of 1688, Parliament enacted the Bill of Rights of 1689 (I Will & Mary Sess. 2, C.2) providing:

> "that the freedome of speech, and debates, or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

In 1689 the House of Commons summoned two Judges of the King's Bench to its bar to answer for a judgment they had given adverse to the claim of the privileges of the lower House involving matters other than the freedom

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[42] The History of English Parliamentary Privilege, p. 30.

of speech. After hearing their defense, the Commons resolved that Judge Pemberton and Judge Jones by "giving judgment to overrule the plea to the jurisdiction of the Court of King's Bench . . . had broken the privileges of the House" and for their breach of privilege they were ordered into custody.[43]

The vigorous assertion of Parliamentary privilege by the House of Commons and its establishment in the Bill of Rights did not mean that improprieties as to speech or debate committed by members of the House went unpunished. An offer of a bribe to, or its acceptance by, a member of Parliament for any matter connected with his parliamentary duties was deemed an insult to Parliament. Even as early as the Seventeenth Century the House of Commons repeatedly sat as a tribunal to hear charges that its members had accepted bribes.[44]

It has been accurately said by one authority that "after the Revolution of 1688 and the consequent Bill of Rights, the privilege of freedom of speech and debate in Parliament was never again seriously questioned or denied."[45] Ever since, for almost 300 years, freedom of speech has protected members of Parliament from any civil or criminal proceedings with respect to speech or debate by the Crown or the courts and we have found no case in England since that against Sir John Eliot in 1629 where the Crown has

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[43] 3 Howell, St. Tr. 331 et seq.

[44] One in 1694, 11 C.J. 274, 5 Parl. His. 900; two in 1695, 11 C.J. 283, 5 Parl. His. 910; and one in 1697. On May 2, 1695, Parliament declared that to offer a bribe to a member of Parliament should be deemed a high crime and misdemeanor, an insult to the member and to the House. The resolution assumed that the tribunal of the House of Commons had sole jurisdiction to hear and convict upon such a charge. *Parliamentary Practice* (12 edt. 1917), p. 85.

[45] *History of English Parliamentary Privilege,* p. 30, 32.

attempted to impeach a speech by way of a conspiracy charge or otherwise.[46]

The entire course of constitutional history of parliamentary privilege in England indicates that the great privilege of speech and debate was intended to free members of the legislative branch from any inhibition caused by fear of prosecution from the Crown stemming from any utterances in Parliament. This history in no way supports the refined distinction between an antecedent agreement to make a speech and the speech itself asserted by the government. Everything said by Wentworth, Eliot, and others denies the distinction. Everything said by the House of Commons in Strode's Act, its Protestation of 1621 and its Resolution of 1667 making clear that Strode's Act was a general law reject the distinction.

In Strode's Act the issue was the effect of Strode's personal interest in the object under debate—an interest antecedent to the introduction of his Bill. In *Ex Parte Wason,* as here, a conspiracy was charged with respect to an agreement antecedent to speech in Parliament. Parliament in Strode's Act and the Queen's Bench in *Wason* held that the historic speech and debate privilege precluded any inquiry by the Crown or the Courts in such matters.

The historic purpose of the speech and debate provision was to prevent any inhibition of members of Parliament with respect to speech or debate. The history of the privilege confirms the view that merely to label the prosecution a conspiracy with respect to the motivation of a speech—an alleged antecedent agreement to make it—would be no less chilling, no less inhibiting than a direct prosecution by the executive power for the content of

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[46] The criminal charge in *Wason* (p. 50-51 herein) was not instituted by the Crown.

speech. Thus the history of the speech and debate clause confirms that it was never designed to admit of the qualification now sought by the government for the first time since the Bill of Rights in 1689.

III

THE CONTENTIONS OF THE GOVERNMENT

A

The Government's Contention That Article I, Section 6 of the Constitution Protects Only Content of a Speech Would Destroy That Provision

Throughout its brief the government argues that, while the Speech and Debate clause prohibits prosecutions founded upon the *content* of a speech delivered in Congress, it permits a prosecution founded upon an alleged criminal antecedent agreement which motivated the speech. This unprecedented distinction suggested by the government is at war with the turbulent history and the basic policy of the privilege.

1. The government's attempted distinction between a criminal charge based upon an antecedent agreement and one based upon the content of a speech is disingenuous in view of the requirements of the conspiracy statute involved in this case and the government's attempt to meet those requirements in the indictment and at trial. The conspiracy statute, 18 U.S.C. 371, requires as an essential element of the offense of conspiracy to defraud the United States not only an antecedent agreement, but also an overt act in furtherance of the conspiracy. The overt act central to the conspiracy indictment against Johnson was overt act number 4:

> "On or about June 30, 1960, in the District of Columbia the defendant THOMAS F. JOHNSON delivered a speech on the floor of the House of Representatives" (App. p. 10).

It cannot be doubted that the proof of this overt act and proof that it was in furtherance of the conspiracy required an inquiry into the content of the speech. *Except for the fact that the content of the speech supported state savings and loan associations* it was not possible for the government to meet its burden of showing that this overt act was in furtherance of the conspiracy. If Johnson had made a speech in the House on June 30, 1960, but it related to foreign policy or constituted an attack upon state savings and loan associations, its content would have denied the charge. Likewise, proof of overt acts 1, 2, 6 and 7 charged in the indictment and proof that they were in furtherance of the conspiracy necessitated an inquiry into the content of the speech delivered by Johnson.

The antecedent agreement charged by paragraph 15 of the conspiracy charge was an alleged agreement by Johnson to make a speech in the House of Representatives *defending state savings and loan associations.* This charge involved the content of speech and required an inquiry into its content.

The transcript of the testimony at trial indicates that a searching inquiry into the motivation, source of material, preparation, content and use of the speech was made by the government. (*For example see Kunkle*, App. 258-260; *Wyckoff*, App. 205-206; *Kiernan*, App. 254; *Buarque*, App. Vol. III, 36-43; *Heflin*, App. 180-191; *Rains*, App. 149-150 and *Johnson*, Tr. 3785-3831.[47]) Thus, even were this Court

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[47] Interrogation of Johnson included these questions:

Asst. U.S. Attorney Marion: "Now your speech was finally de-

to accept in principle the distinction asserted by the government, it could have no relevance to the prosecution of Johnson.

2. The history of legislative liberty emphatically repudiates the restrictive interpretation claimed by the government. That history makes clear that its prohibition was intended to enable the elective branch of the government to be free from any possibility that they be degraded, intimidated, discredited or oppressed by any criminal charge by the executive power with respect to legislative speech or debate. As Blackstone said "The privilege of Parliament was principally established in order to protect its members not only from being molested by their fellow subjects but also more especially from being oppressed by the power of the Crown."[48]

> "Article I of the Constitution, in saying of members of the Senate and House alike that "for any Speech or Debate . . . they shall not be questioned in any other place," was intended mainly to prevent harassment of legislators by the Executive authority as Parlia-

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livered or submitted to the clerk and it was printed in the Congressional Record, and it stresses the value of commercial mortgage guaranty insurance, does it not?" (Tr. 3805).

Asst. U.S. Attorney Marion: "Congressman, do you mean to tell the jury that Mr. Buarque put that language in the speech about three indicted institutions and none convicted, and you did not inquire as to which particular institutions they were?" (Tr. 3805).

In argument to the jury government counsel said "Congressman Johnson claimed under oath, Member of the Jury, that he did not even bother to check the facts to ascertain whether he could truthfully make such a statement in his speech.

"If so, I submit to you, it was utterly and completely irresponsible and reprehensible. . . ." (Tr. 5839).

[48] Blackstone, *Commentaries*, ch. 2, p. 164, also Holdsworth, *History of English Law* (1924), vol. 6, p. 231.

ment once protected itself from such harassments by a King."[49]

As we have shown, the leading case in England in the 16th Century—*Strode's* Case of 1512—did not involve the content of utterances in the House of Commons. On the contrary, Strode was charged by the Crown in the King's Bench with having a financial interest in a bill introduced by him in the House, such financial interest being antecedent to his legislative action. In 1521 Parliament annulled his conviction in its famous Strode's Act which attempted to deny to the Crown any authority to make any criminal charge of any kind with respect to speech or debate or other legislative action of a member of the House of Commons. Thereafter it was the firm position of the Parliamentarians that Strode's Act was a general act applicable to any accusation by the Crown with respect to legislative speech or action. After the Civil War and the Restoration in 1667 the House of Commons formally adopted a resolution declaring Strode's Act of 1521 attempting to guarantee freedom of legislative action a general law declaratory of the "ancient and necessary rights and privileges of Parliament." Thus the most significant case in the history of the development of legislative freedom, ultimately established by the Bill of Rights of 1689, was not related to the *content* of speech in the House of Commons and Strode's Acts of 1521 and 1667 were directed at nullifying all executive and judicial action which attempted to question the alleged criminal motivation of legislative speech and action.

In *Ex Parte Wason* 4 QB. 573 (1869) the Queens Bench held that it had no jurisdiction of a conspiracy charge that an allegedly unlawful antecedent agreement had been made

[49] William S. White, CITADEL, The Story of the U.S. Senate (1956), ch. XIX, p. 265.

relative to speech in the House of Lords. Thus the Court rejected the very contention made by the government here. The language of Cockburn, C.J., in *Wason* is equally applicable to Johnson:

> ". . . Mr. Wason charged and proposed to make the substance of the indictment, that these three persons did conspire to deceive the House of Lords by statements made in the House of Lords for the purpose of frustrating the petition. Such a charge could not be maintained in a court of law. It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy (i.e. the antecedent agreement) to make such statements would not make the persons guilty of it amenable to the criminal law . . .".[50]

As Blackburn, J., stated:

> "I perfectly agree with my Lord as to what the substance of the information is; and when the House is sitting and statements are made in either House of Parliament, the member making them is not amenable to the criminal law. It is quite clear that no indictment will lie for making them, nor for a conspiracy or agreement to make them, even though the statements be false to the knowledge of the persons making them. I entirely concur in thinking that the information did only charge an agreement to make statements in the House of Lords, and therefore did not charge any indictable offence."

The historic background of the speech and debate privilege, i.e. the struggle between the House of Commons and the Crown culminating in bloody civil war, makes it un-

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[50] In its brief the government has misread *Wason* and quotes one sentence out of context from the quotation above (Gov't Brief p. 25).

deniably clear that the fundamental purpose of the privilege was to protect, not the content of speech, but the speakers themselves and indeed the entire legislative body from criminal prosecution by the Crown with respect to any and all utterances and their purposes in the legislative chamber.

Everything said by the Parliamentarians, Wentworth, Eliot, and others is a denial of the qualification sought by the government here that the speech and debate provision of the Bill of Rights did not apply to the alleged criminal motivation of legislative speech and everything said by the House of Commons in Strode's Act of 1512, in its Protestation of 1621 and in its second Strode's Act of 1667 make clear that speech and debate in Parliament, including content and motivation, could not be the foundation of any criminal charge by the Crown. *Wason* confirmed this conclusion.

The very fact that since the enactment in 1512 of Strode's Act, the Crown has never charged a criminal conspiracy with respect to speech in the House of Commons,[51] although the Star Chamber had created the offense of conspiracy, best indicates that the Crown and its legal advisers have been ignorant for over 400 years of the qualification now claimed by our government, namely, that the ancient privilege with respect to speech and debate claimed by Parliament did not extend to the alleged criminal motivation of speech there. The purported discovery by the executive power of the United States in 1965 of such an attenuated distinction comes too late.

3. The ultimate purpose of the Speech and Debate clause of our Constitution, as in the case of the Bill of Rights, was to encourage the utmost freedom of speech by any member

[51] In *Wason* the charge was not made by the Crown.

of the legislative branch of the government by precluding any inquiry, any investigation and any criminal charge with respect to the motivation or content of words spoken in the legislative chambers. To preclude the possibility of a baseless criminal charge which might intimidate and restrain freedom of speech, the Bill of Rights and later Article 1, Sec. 6 of our Constitution denied any authority to the executive power to make any charge with respect to speech, its purpose, or its motivation. *Tenney,* p. 377.

It is not the philosophy of the Speech and Debate clause to remove all possible sanctions against the legislator. His constituents, his business associates, his friends, the press and the public all have "coercive" power. Even the executive branch of the government is not helpless if it believes that a legislator has been faithless to his trust, with respect to speech in the Congress. It may refer the evidence of impropriety to the House or Senate. It may criticize and even castigate. But the executive has no jurisdiction to institute criminal proceedings with respect to the motivation of any utterances made in the legislative chambers and the judiciary has no jurisdiction to try such proceedings.

4. If the founding fathers had intended that the constitutional provision be narrowly interpreted, as the government contends, it may be assumed that they would have said so and in such event the provision would have read: "*for the content* of any speech or debate in either House, they shall not be questioned in any other place" or "for any speech or debate in any House *which is not made for a criminal purpose,* they shall not be questioned in any other place."

5. The government contends that the objective of the privilege to promote the independence of the legislature

would be subverted if the privilege could be used to protect the legislator "in the very act of forsaking that trust in favor of a private allegiance" (Gov't Brief, p. 27). In our discussion of *Tenney* we showed that the test of the application of the constitutional prohibition may not depend upon whether the executive claims a dishonest or criminal purpose because that prohibition is not cast in terms of propriety or impropriety, or rightful or wrongful conduct; on the contrary its prohibition is absolute. The question is not whether a member of Congress should be punished for a venal or otherwise improper speech but by what tribunal this shall be done—the House, the Senate or the Courts. Article 1, Section 6 directs that it may be done only by the House or Senate.[52]

6. Practical considerations point up the illusion of the government's attempt to distinguish between the content of speech and an alleged antecedent agreement giving rise to the speech. It is not realistic to believe that any prosecution would ever occur without regard to the content of a particular speech. One cannot visualize a criminal charge involving the relationship of a speech in the Congress and a gift or political campaign contribution in the case of any well known leader of a national political party because such a charge would be promptly labeled a political perse-

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[52] Nor is the power of the Congress to punish a member for unethical conduct inadequate. Either House is empowered by Article I, Section 5 to punish a member for disorderly behavior and by a vote of 2/3rds to expel a member. The power to punish extends to all cases where the offense is deemed inconsistent with the trust and duty of the member and in a proper case a member may be imprisoned. *Kilbourn v. Thompson,* 103 U.S. 168 (1881); *Re Chapman,* 166 U.S. 661, 669 (1897); *Marshall v. Gordon,* 243 U.S. 521, (1917); *McGrain v. Daugherty,* 273 U.S. 135, 172 (1927). The possibility that the Congress may abusively or oppressively exercise a constitutionally granted authority affords no ground for denying the power. *McGrain v. Daugherty,* p. 175.

cution. Only the obscure or the obnoxious would need to fear the heavy hand of executive power. The innovator and the radical speaking against the current and strongly held majority view would be the most likely objects of such a conspiracy charge. It is to be doubted that a conspiracy charge involving speech in Congress would be initiated or could be sustained where a Congressman, who is a member of one of the two major parties spoke in support of the position of his party. It would be too much to expect the prosecution of a member of Congress who spoke in support of presidential policy. It is beyond belief that a Congressman would be claimed to have conspired to make a speech for compensation calling for the creation of a national cultural center, or calling for a change in the color of service uniforms, or calling for the inscription of the Lord's Prayer on the capitol steps, or calling for the adoption of the chrysanthemum as the national flower. But when a speech is made in favor of the "wrong", the unpopular, side of a hot political "potato", as in this case, then a prosecution would be more likely to be made by the executive power and more likely to be successful. Thus the content of a speech and a criminal charge of conspiracy are not separable.

7. In their arguments to the jury government counsel contended that Congressman Johnson must have been influenced in giving his speech by the $500.00 campaign contribution he received from Robinson, and in its brief in the Fourth Circuit the government stated that "the government certainly did not have to prove that the Congressman's *sole* motive in giving the speech was to receive compensation or to aid Edlin or Robinson . . ." (Gov't Brief in the Fourth Circuit p. 32). Thus the prosecution correctly confessed that under the conspiracy charge it was not necessary even to prove an antecedent agree-

ment with respect to the speech or that it was even necessary for the government to establish that Johnson was employed, or even consciously agreed, to make a speech for a campaign contribution. According to the government's view, in which we concur, all that was necessary was for the jury to find that in making his speech Congressman Johnson was influenced in part by a campaign contribution made 10 days before he spoke or by a wish to aid Edlin or Robinson.

8. The cynicism of the government's position is best indicated by the fact that historically the greatest corrupter of the legislative branch of the government has been the executive power. "William, like Charles II and James II had found that it was necessary to corrupt the House of Commons in order to manage it."[53] The government accurately refers to numerous efforts made by the Crown and its ministers, including George III and Walpole, to bribe members of Parliament (Gov't Brief, p. 27, 28). We know that even today members of Congress are rewarded or punished by the executive power. They are rewarded for their support and punished for their opposition by the granting and withholding of patronage or presidential favor. Is it conspiracy to defraud the government of his faithful services for a member of Congress to make a speech defending the position of the administration with the understanding that a supporter will receive a lucrative administrative position? Is "compensation" limited to a money gift or a political campaign contribution, or is compensation to be deemed to include the benefits of presidential favor? Yet it would be too much to expect the Attorney General to attack his own employer by seeking an indictment in such circumstances.

9. The comparatively slight burden of proof upon the

[53] *History of English Law*, VI Holdsworth (Methuen, 1924) p. 246.

government under Section 371 is an important factor for consideration in determining whether a Section 371 conspiracy charge relative to speech in the Congress is prohibited by the Speech and Debate provision. Any member of Congress confronted with such an accusation upon mere proof of the gift and the speech must explain his purposes in making the speech and demonstrate that he was not influenced by the gift. This case illustrates the grave dangers involved in a conspiracy charge leveled at the motivation of speech delivered in Congress. As the Fourth Circuit pointed out, the end result was an inquisition into Congressman Johnson's motivations (337 F.2d 189, 204), a disgraceful inquiry in which he was compelled upon direct examination and cross-examination to give the Court and jury a detailed explanation of his thoughts and purposes with respect to his speech. This inevitable and shocking procedure could not but have chilling effects on the freedom of expression of every other member of the Congress.

10. The government attempts to separate the inseparable when it claims that it was not challenging the content of the speech but only its venal purpose. The motivation of speech or debate is so related to content they are indistinguishable for no words are spoken or written without purpose. When the Tudors, Charles I and James I leveled their charges of treason and sedition against members of the Commons for their legislative utterances, intent was an inherent element of the offense. A speech has no meaning without reference to its motivation and the effort of the government to distinguish between an attack upon the spoken word and an attack upon the criminal purpose of the word involves sophistry as well as an invitation to the emasculation of the constitutional principle.

Modern psychology teaches that the motivation or causation of any human action involves a difficult, complicated, perplexing inquiry. Human action is subject to unconscious as well as conscious influences involving the life of the individual, his environment and his personality.[54] This must be particularly true of human utterances. For a jury to be permitted to speculate with respect to the causation of a particular utterance in the Congress, i.e., whether a speech there was caused or influenced by a political campaign contribution, would require it to be gifted with a talent even unclaimed by the philosopher, psychologist or psychiatrist.

11. The government postulates the hypothetical situation of a criminal agreement to make a speech when the speech is not in fact delivered. It then argues that in that case a charge of conspiracy to defraud would not be barred by Article 1, Section 6 (Gov't Brief, p. 11, 18). The theoretical nature of such a situation is indicated by the obvious fact that in such a case a conspiracy charge would be almost impossible to initiate or to sustain. Indeed it is inconceivable that in such a situation a successful prosecution could be maintained. This hypothesis does not rise to a constitutional level because, if there is no speech or debate to be questioned, the constitutional privilege is not involved. On the other hand, when a congressional speech, allegedly the object of an unlawful agreement is made, the danger is ever present, real and substantial, that the charge of an unlawful agreement is merely a front for an actual attack on the speech and thus nothing less than a

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[54] Edward B. Titchner, *A Textbook of Psychology*, p. 468 (N.Y. 1913); W. S. Taylor, *Dynamic and Abnormal Psychology*, p. 82, 86, 88, 400, 401, 409, 410 (N.Y. 1954); Gardner Murphy, *Personality. A Bio-Social Approach to Origin and Structure*, p. 88, 89, 127 (N.Y. 1947); R. F. Peters, *Concept of Motive*, (London 1965).

devious (or at best ingenuous) attempt to circumvent the provisions of Article I, Section 6.

12. The government's dislike for Article 1, Section 6 has caused it to suggest an interpretation of the Speech and Debate clause, which if accepted, would emasculate, if not destroy, that privilege. Under its interpretation even an untruthful speech could qualify as a "defrauding of the government" under Section 371 as construed by the government and the District Court. The antecedent agreement to make the false speech would be the conspiratorial agreement under Section 371. The speech would qualify as the overt act required by Section 371. In such a case government counsel could say, as they do here, that the content of the speech was not under attack. Thus, the Speech and Debate clause would seem to lose all vitality if the government's view of that clause were accepted.

13. Article 1, Section 6 is founded on the assumption that our system can tolerate or countenance sin at least to the extent that we deny a judicial remedy in the limited area of speech and debate. It is this nation's view that in the long run our governmental system will benefit from the unrestrained, uninhibited speech of legislators who have no reason to fear that the system can turn on them for their utterances in that most dreaded way, criminal prosecution. Such an assurance is only possible when the privilege is available to those whom the executive suspects of guilt as well as to those who are believed innocent of any wrongdoing. If the privilege does not have this meaning, it is without value. This Court made this perfectly clear in *Tenney*. If the government is free to charge that a speech delivered on the floor of Congress was motivated by a money payment the high objective of the privilege is not satisfied. A pall of fear would hang over the Congress. The price of such curtailment would be more than society

can afford to pay. Once this is recognized it becomes readily apparent that the government's argument that the "agreement" to make a speech and the content of the speech should be distinguished in determining the scope of the privilege is nothing short of constitutional heresy.

14. In determining whether the Fourth Circuit was correct in holding that this conspiracy charge violated the Speech and Debate provision of the Constitution, this Court in the final analysis must make a choice of values. On the one hand is the litany of the government that there should be no barrier to the criminal prosecution of a member of Congress for agreeing to make a venal speech and the needs of society demand prosecution and punishment. History records that there has never been a criminal charge by the Crown in a court of England with respect to legislative speech since the case of Sir John Eliot in 1629 and none in the annals of the federal and state courts of this country before this case. The very fact that there has never been such a prosecution in almost 350 years best indicates that there has been no social need for it. Members of the legislative branch of the government are subject to prosecution for every act (excluding speech and its motivation in the Congress) made a federal or state offense. In the tight limited area of legislative speech and debate history does not suggest that numerous legislative wrong-doers have been escaping punishment for venal speeches.

Even if the government could demonstrate that it was socially desirable that the maker of a venal speech in the Congress be prosecuted by the executive and be punished by the judiciary upon the assumption that criminal prosecution is the panacea for all sin, that social good is far outweighed by other values.

There are no crying social demands that the Speech and

Debate provision of the Constitution be narrowly construed, curtailed or emasculated. No legal or other scholar has ever advocated it; no member of the Senate or the House has ever proposed the possibility. Thus the government has failed to establish that there is a recognized social benefit in restricting the Speech and Debate clause.

15. The only way the Government could even attempt to question this speech or any other speech made in the Congress is by way of a charge under this Section 371 conspiracy statute. The collaboration by a member of Congress with others in the making of a speech, the making of a speech in the Congress due to self-interest or for personal gain and the distribution of copies of a speech are not substantive offenses under any criminal law of the United States. The Government and the District Court conceded that the constitutional provision precludes the Government from making a charge of treason, sedition or criminal libel with respect to a speech made in the Congress. Yet, this concession is meaningless because the constitutional definition of treason precludes any charge of treason from being leveled at speech or debate; there have been no sedition laws in the United States since 1800; and there has never been a federal criminal libel law. Thus, the Government's interpretation of the limited scope of this historic constitutional principle, if accepted, would effectively sterilize it from any utility or significance in the world in which we now live because the executive would be free to charge, and the judiciary to hear, an accusation that a member of Congress conspired to defraud the Government by making a speech in the Congress pursuant to an "antecedent agreement."

B

The Contention of the Government as to the Federal Bribery Statute Is Without Substance

Throughout its brief the government assumes that this case involves the constitutionality of the federal bribery statute rather than the validity of the conspiracy charge under Section 371.

The federal bribery statute made it an offense for one to give to a member of Congress, and for a member of Congress to accept, a bribe to influence "his action, vote or decision" "on any question, matter, cause or proceeding which may at any time be pending in either House" (18 U.S.C. Sec. 205; revised in 1962 as Sec. 201).[55] The government did not charge Mr. Johnson with violating this statute or with conspiracy to do so. Accordingly any consideration by the Court of its validity would violate two of the Supreme Court's most frequently repeated canons of constitutional decision. A constitutional question is not decided when it is not necessary for the Court to do so. The Court will not decide a constitutional question which upon the facts is not presented for decision.

The government could not have charged Mr. Johnson with violating the federal bribery statute or conspiring to do so, because its terms limited the offense to official action, vote or decision with respect to pending matters. The speech, which Mr. Johnson made in the House of Representatives was unrelated to any proposed legislation or to any other matter pending in the House. His speech could not be deemed a vote, decision or other official act with respect to pending matters.

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[55] It is significant also that all statutes forbidding the acceptance of bribes by members of state legislatures carefully refrain from including in their proscription speech or debate.

The government could not have charged Mr. Johnson with violating this statute or conspiring to do so for the additional reason that the statute carefully refrained from including speech or debate in the proscribed conduct. The cardinal principle that a penal statute must be narrowly interpreted would preclude the Court, in interpreting this statute from extending it to include speech or debate especially when the great tradition of legislative liberty has for so long protected utterances and their motivation in legislative chambers. *Tenney*, p. 377.

An analysis of the government's assumption that the federal bribery statute is at the heart of this case and that to undermine its applicability to members of Congress would be dire makes clear that the statute affords the government no aid either directly or by way of analogy.

1. There never has been a conviction of a member of Congress under the bribery statute; indeed so far as we can ascertain there has never even been a prosecution. Thus the constitutional plan of remitting Congressional discipline to the respective Houses historically has had the continuing acquiescence of the executive power. Perhaps as the government suggested in its petition for certiorari (p. 7) the decision in this case will promote the concentration by Congress on its problem of self-discipline which is the corollary of its constitutional prerogative.

2. The only relevance of the bribery statute we can perceive in this case is that, in contrast to the defrauding provision of Section 371, it indicates a Congressional intention to apply its sanction to the vote of a Congressman. In contrast, Section 371 clearly does not apply to anything which could be denominated Speech or Debate. Thus if the bribery statute has any pertinence, it tends to confirm our showing at pages 70 to 76 herein that Section 371 was never intended to apply to speech or debate in Congress.

3. Since neither the constitutionality nor any other aspect of the bribery statute is involved in this case, speculations about the validity of that statute, including the government's, are futile. Suffice it to say that the notion of the government that the decision of the Fourth Circuit, holding the conspiracy charge violated the Speech and Debate provision of the Constitution, casts doubt upon the validity of the bribery statute is not correct. Doubt as to the validity of the bribery statute was created by the decision of this court in *Kilbourn* in 1881 and in *Tenney* in 1951 holding that the Speech and Debate provision applied to *all* official acts of members of Congress. A decision that the Speech and Debate provision of the Constitution applies to the motivation and content of speech in the House of Representatives could not have any effect upon the validity of the bribery statute as applied to a vote or other official conduct within its proscription.

C

The Other Contentions of the Government Have No Merit

1. The government argues that the guarantees of a fair trial in the Federal Constitution make a judicial forum of a conspiracy charge with respect to speech in the Congress more attractive than a legislative one. (Gov't Brief pp. 36-37). This approach would have been permissible argument in the Constitutional Convention of 1787 in opposition to the Speech and Debate clause. It has been foreclosed by the enactment of that clause and by its interpretation by this Court in *Kilbourn* and *Tenney*.

Some of the factors which made the resolution of the argument by the Constitutional Convention the appropriate one are illustrated by the case at bar. In a contest which

became the focus of local mass media for 2½ months the norms of a judicial trial certainly were not as protective as those of a legislative forum where the perception and understanding of colleagues would have promoted appreciation of the realities of the situation. Likewise, the outcome of a judicial trial is not necessarily more safeguarded from factors extraneous to the dictates of justice than a legislative trial would be. The facts of this case—the timing of the indictment 3 weeks before the election, the indefinite character of the conspiracy charge, the intense competition between state savings and loan associations and Federal savings and loan associations throughout the country, the witnesses, the publicity, and the nature of the trial all suggest that a court trial may become a dangerous vehicle quite as readily as may a legislative inquiry.

2. The government claims that the cases interpreting the scope of the *judicial* privilege make it clear that a judge cannot be held liable for the content of any judicial opinion but a judge is not immune from a charge of accepting a bribe in exchange for an opinion, judgment, or decree. (Gov't brief 11-13) Neither the policy nor the scope of the judicial privilege are even remotely comparable to that of the legislative privilege.

First there is no constitutional provision in the judicial area equivalent to the speech and debate clause which, as to legislative speech, states in unequivocable terms that it may not be questioned outside the Congress. The presence of an explicit constitutional provision as to legislators and its absence as to judges offers a clear distinction between the two privileges. The second feature distinguishing these privileges is the fact that the constitutional privilege of speech and debate in the Congress is the primary privilege without which all other privileges would be comparatively meaningless, (Story, Commentaries on the Constitution,

Vol. I, 5th Ed. 1891, p. 630). This aspect of the Speech and Debate clause indicates, as this Court stated in *Tenney* and *Kilbourn*, that aside from its unqualified directive, that clause must be liberally construed. Third, the constitutional scheme for protecting the integrity of the judiciary—life tenure, no diminution in salary—is necessarily different from that for Congress because of the difference in the nature of the problems. The scheme for protecting Congress is complete freedom of speech and debate and the provision that each House is the judge of the conduct there of its members.

3. In contending that the objective of the privilege would be subverted if the privilege could be used to protect a legislator "in the very act of forsaking that trust in favor of a private allegiance" (Gov't Brief p. 27), the government claims that the executive power is free to question whether a member of Congress was influenced in making a speech in the Congress by a "private allegiance" which inevitably involves a searching inquiry into his motivations.

"A Senator of the United States is an ambulant converging point for pressures and counter-pressures of high, medium and low purposes."[56] "Economic pressure, however, is only the beginning for a Senator. In the more intimate sense there is the pressure of constituents, of lobbies, of his own party and of the White House."[57] Whether a Senator or a member of the House of Representatives was influenced in making a speech by a "private allegiance" would involve a psychological study of his conscious and subconscious mental processes.[58] It would involve not merely an impossible task for a jury but the

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[56] Citadel, p. 135.

[57] Citadel, p. 138-9.

[58] See note 54.

annihilation of the Speech and Debate provision of the Constitution and an outrageous invasion of the sanctuary of a member of Congress—his mind.

4. The government fences with windmills when it contends that the Fourth Circuit "may have held" Article 1, Section 5 restricts the power of Congress to provide for judicial punishment of its members (Gov't Brief p. 31). This constitutional provision gives each House authority to punish its members and, with the concurrence of two-thirds, to expel a member. The Fourth Circuit's decision was based on the Speech and Debate Clause of Article 1, Section 6. That Court merely referred to Article 1, Section 5 to indicate that the Senate and House each has the constitutional power to impose sanctions with respect to improper or unethical speech in its chamber.

5. The government contends that a small portion of the testimony "in the government's case in chief" related to Johnson's speech in the House of Representatives and "the government clearly proved its case [under the conspiracy charge] independent of the speech or inferences therefrom" so the Speech and Debate clause did not warrant a reversal. (Gov't Brief pp. 16, 17). When the Court of Appeals found that "one-half of the testimony introduced at the trial related to the speech" (p. 190) the Court was, of course, referring to one-half of the testimony relating to Johnson and accordingly the statement was an accurate one.[59]

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[59] A mass of evidence came in with respect to Boykin's land transactions in Southern Maryland and Virginia, the purchase price paid for these tracts of land, their sales by Boykin to land companies formed by the savings and loan associations and the value of the tracts as compared with the purchase price paid for them—all for the purpose of showing (or negating) that Boykin participated in the alleged conspiracy charged in the First Count by having a personal financial interest in the dismissal or postponement of the mail fraud case against Edlin.

The government is mistaken in saying that no testimony "concerned the content or giving of the speech" (Gov't Brief p. 16). Much of it did and Johnson was examined and cross-examined at length on the witness stand with respect to his motivation in giving the speech (Tr. 3191-3204, 3786-3831), the source of material in it, its preparation and drafting (Tr. 3802-03, 3814-3816), and he was even interrogated as to particular statements contained in it (Tr. 3805, 3815).

The District Judge instructed the jury that the jury might find that the government proved "2 separate conspiracies, the first beginning on April 1, 1960 to defraud the United States of its governmental functions largely by the making of the speech by defendant Johnson and distribution of reprints thereof; the second, beginning in 1961 to defraud the United States" by unlawfully seeking the dismissal or postponement of the pending criminal case. (App. 93). Thus the

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All of the extensive testimony relating to events in the year 1960 would seem to bear no relationship to the charges of the substantive counts that Johnson accepted specific checks as compensation for his visits to the Department of Justice after February 1961. This 1960 material included Johnson's speech of June 30, 1960, which was introduced in evidence by the government (App. 258-260) discussions of Heflin, Robinson and Edlin about their hopes that a Congressman might make a speech defending state savings and loan associations, representations made to Johnson as to the unfair treatment being accorded the state savings and loan associations by the federal savings and loan associations, the motivation and content of the speech, the $500.00 campaign contribution of June 20, 1960, by Robinson to Johnson, the orders for the reprints of the speech and its distribution and the use made of them by the savings and loan associations, etc.

The testimony of the following witnesses related exclusively or almost exclusively to Mr. Johnson's speech of June 30, 1960: Sadie Goldman (App. 160); Martin Heflin (App. 172); Bradford Wyckoff (App. 205); Russell O. Hickman (App. 246); Frances Kiernan (App. 253); Earl Kunkel (App. 255); and Manual Marque (App. 466, App. Vol. III, p. 36). The testimony of other witnesses, including Johnson and Robinson, related in part to the Johnson speech.

District Judge focused the attention of the jury upon Johnson's speech in the House of Representatives in as definitive a way as was possible. In argument to the jury government counsel placed major emphasis upon Johnson's alleged venal speech. (App. Vol. III 233-249). The notion implied by the government that the evidence with respect to the speech was merely incidental to the all embracing conspiracy charge is without substance.

6. Underlying the narrow construction of the Speech and Debate clause sought by the government is the assumption that the historic reason for it has evaporated. The government's contention presupposes that the executive can now be trusted in the year of our Lord 1965 to act impartially in the public interest in all matters of law enforcement. The Constitution was constructed upon a very different basis, namely, that the exercise of power by men temporarily invested with such power must be carefully circumscribed.

It is significant that the assertion by the executive of the power to make a criminal charge with respect to speech in a legislative chamber, unprecedented since the case of Sir John Eliot in 1629, almost 350 years ago, comes at a time when the overriding critical political problem in our world is the undue development of executive power. In Asia, Africa, Latin America and Eastern Europe there has been a steady deterioration of the vitality of parliamentary power accompanied by an extraordinary enhancement of executive power. "As society becomes more equalitarian it tends increasingly to concentrate absolute power in the hands of one single man." "Caesarism is not dictatorship, not the result of one man's overriding ambition, not a brutal seizure of power through revolution. It is based on a specific doctrine of philosophy. It is essentially pragmatic and untheoretical. It is a slow, often century-old un-

conscious development that ends in a voluntary surrender of a free people escaping from freedom to one autocratic master."[60]

Thus when the transcendental problem of government almost everywhere is the maintenance of constitutional restraint upon executive power, the executive again in this case challenges legislative liberty.

IV

IN ENACTING THE CONSPIRACY STATUTE CONGRESS DID NOT INTEND THAT IT APPLY TO THE MOTIVES OF A MEMBER OF THE HOUSE OF REPRESENTATIVES IN MAKING A SPEECH THERE.

To sustain Count One the Court must find that Congress in enacting the conspiracy statute *intended* that it should apply to a conspiracy relative to a speech in the House of Representatives for the personal profit of a member.

In *Tenney*, members of the Legislature of California were alleged to have violated an 1871 federal civil conspiracy statute which defined the conspiracy with specificity and provided for a civil remedy. This Court held that a basic issue was whether Congress, in enacting the statute, had intended to include within its coverage official acts of a member of a state legislature. The Court determined that Congress did not have such an intention.

The Court said (p. 376):

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative

[60] *The Coming Caesars*, de Riencourt (1957). The author detected such a trend in the United States in the growing "father complex" incident to the Presidency with its vast powers.

freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of Sections 1 and 2 of the 1871 statute—now Sections 43 and 47(3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."

Although the statute in that case was designed to provide a civil remedy for a conspiracy to violate civil rights, the Court, as it had done in *Kilbourn*, deemed the Constitutional principle of Article 1, Section 6, which by its terms only related to speech and debate in the Congress, to apply to *all* official acts of legislative members. Although Article 1, Section 6 only related to speech and debate in the *Congress*, the Court deemed its tradition of legislative freedom of such paramount significance that the Court extended it to all official acts of members of a *state* legislature.

The Johnson case does not relate to the acts of members of a state legislature, nor even to official acts of a member of the Congress unrelated to speech and debate; it relates to a speech and its motivation in the House of Representatives, the very heart and core of Article 1, Section 6. As in the case of the 1871 civil conspiracy statute involved in *Tenney*, the limits of the 1867 conspiracy statute involved here "were not spelled out in debate" and there is nothing

in its general language to suggest that Congress could have believed that it was sanctioning a charge of conspiracy to defraud the United States of the faithful services of a member of Congress by making a speech for personal profit on the floor of the House of Representatives. As this Court said in *Tenney* "Did it [the statute] mean to subject legislators to civil [criminal] liability for acts done within the sphere of legislative activity?". The answer the Court gave to the question posed is as plainly applicable to this 1867 criminal conspiracy statute as to the 1871 civil conspiracy statute involved in *Tenney*. Indeed the reasoning of the Court there has a far more solid and logical basis as applied to the situation here than in *Tenney* which involved merely a civil liability since this case involves a penal liability which under established principles must be interpreted strictly for the protection of the rights of an accused.

Is Congress' vital freedom of speech and debate to be at the mercy of a vague, imprecise, all-inclusive charge under a general 1867 conspiracy statute? The federal courts, particularly the district courts, have steadily expanded the meaning of the statute but no Court has ever held before[61] that in enacting the statute Congress could have remotely intended "to overturn the tradition of legislative freedom achieved in England by civil war and carefully preserved in the formation of State and National Governments." Under the teaching of *Tenney* Congress cannot be deemed to have had any such intention.

This conclusion is confirmed by the cardinal principle that, when a statute is reasonably susceptible of 2 interpretations, by one of which it is unconstitutional and by

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[61] Unable to distinguish *Tenney*, in sustaining Count One the District Court ignored it.

the other valid, the Court prefers the meaning that preserves to the meaning that destroys.[62] It is also confirmed by the established principle that, if a statute may be accorded several interpretations, that which involves serious constitutional problems will be avoided.[63] In the case of this penal statute there must be assurance of reasonable certainty in concluding that Congress by necessary implication intended to extend the penalties of the statute to an alleged conspiracy to make a speech for compensation in the Congress. The doubt and ambiguity concerning the scope of the acts forbidden by Sec. 371 beyond those clearly and proximately connected with a conspiracy to defraud the United States of its money or property raise greater doubts that Congress could have meant to encompass within its penal provisions a criminal purpose as to a speech in the House of Representatives.

In *United States v. Gradwell,* 243 U.S. 476 (1917) this Court invalidated an indictment under this same conspiracy statute on the ground that Congress had not intended to include the alleged offenses within the scope of the "defrauding" part of Section 371. There the government charged that the defendants conspired to defraud the United States "in the matter of its governmental rights" by bribing voters in elections of members of Congress. This Court held the defrauding part of the conspiracy statute inapplicable on the ground that it was not the purpose of Congress that it would be so applied and distinguished cases where the conspiracy charged related to the operations of the federal government.

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[62] *Delaware & H Co. v. United States,* 266 U.S. 438, 443 (1925); *Knight Templars' & M. Life Indem. Co.* v. *Jarman,* 187 U.S. 197, 205 (1902).

[63] *International Assoc. of Machinists v. Street,* 367 U.S. 740, 749 (1961); *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932).

Although in its general proscription of conspiracy to defraud the United States, Section 371 did not exclude frauds with respect to the election of members of Congress, the Court made the exclusion in interpreting the Section by reason of its limited purposes. As an aid in ascertaining congressional intent the Court focused on the ability of Congress to resort to its jealously guarded power to judge of the elections, returns and qualifications of its members under Article I, Section 5, Clause 1 of the Constitution.

The reasoning of the Court in *Gradwell* is especially pertinent here because Section 6, Clause 1 of Article I prohibits speech or debate in the Congress from being questioned in any other place and each House may punish its members for disorderly behavior and with the concurrence of 2/3rds even expel a member. The Constitution reserved to the Congress the exclusive power to determine the propriety or impropriety of speech; it granted the Congress the non-exclusive power to judge of the elections, returns and qualifications of its own members.

Thus in the case at bar, as in *Gradwell*, there is a constitutional provision conferring paramount authority upon the Congress to deal with the alleged improprieties. The executive has in effect claimed that a portion of the Congressional prerogative has been transferred to it by Section 371 as regards elections *(Gradwell)* and speech in this case. The Congressional prerogative to act as its own disciplinarian is surely a more vital power when a speech by a Congressman is questioned than when interference with a Congressional election is involved. This Court may not hold that Congress intended in enacting Section 371 to surrender a part of its prerogatives with respect to speech in the Congress when the Speech and Debate Clause, unlike the constitutional provision as to

elections, is cast in terms of a prohibition of executive action.

Again in *Hammerschmidt* this Court, in spite of the general language of the conspiracy statute and the Court's expansive *obiter* as to the meaning of its defrauding part, held that it did not reach a conspiracy to defraud the United States by obstructing the functioning of the government by an open defiance of the enforcement of a federal law. There the government claimed that the defendants had published and circulated material designed to elicit disobedience to the provisions of the Selective Service Act. Implicit in the Court's decision must have been a recognition that a contrary interpretation would have involved serious questions under the First Amendment. "The reluctance of the courts to expand the coverage of criminal statutes is particularly important where, as here, the statute results in censorship."[64] The Court held that such an application of the statute was not within the intention of the Congress in enacting Section 371.

In view of the evident doubt as to the reach of Section 371 to encompass very different acts from those which were visualized by the Congress in its enactment, the prior determination by this Court in *Tenney* with respect to a comparable conspiracy statute and in *Gradwell* and *Hammerschmidt* with respect to the very statute in question and the vitality of the great principle of legislative liberty in the Speech and Debate provision of the Constitution, it is submitted that this Court should determine that Congress in enacting the conspiracy statute did not intend that it should apply to a conspiracy relative to speech in the House of Representatives for the alleged personal profit of a member.

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[64] *United States v. Alpers*, 338 U.S. 680, 686 (1949); see also *Smith v. California*, 361 U.S. 147 (1959).

V

THE INDEFINITE NATURE OF THE CONSPIRACY CHARGE VIOLATED THE DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHT THAT THE INDICTMENT CLEARLY INFORM HIM OF THE OFFENSE CHARGED

A

The validity of any conspiracy charge must be evaluated and determined by the alleged purpose or objective of the conspiratorial agreement charged. The offense is the conspiracy itself, namely, the unlawful agreement because the offense becomes complete when the agreement is made. The validity or invalidity of the conspiracy charge as well as the scope of the conspiracy depends therefore upon the asserted purpose of the conspiracy.[65] The conspiracy must be sufficiently charged and cannot be aided by allegations of overt acts.[66] When the government alleged, as here, a

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[65] *Goldstein, Conspiracy to Defraud the United States,* 68 Yale L. J. 404, 406 (1959): "The agreement to accomplish the prohibited purpose furnishes, without more, the basis for criminal liability." "The gist of the offense of conspiracy as defined by [Section 371] is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Falcone,* 311 U.S. 205, 210, (1940). See also Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants,* 62 H.L.R. 276, 278, (1948) and *United States* v. *Deutsch,* 243 F.2d 435 (3rd 1957).

[66] "The crucial question . . . is the scope of the conspiratorial agreement for it is that which determines . . . whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Grunewald* v. *United States,* 353 U.S. 391 (1957) "The only effect of the requirement [of Section 371] that an overt act shall be shown is to permit an abandonment of the conspiracy in the meantime and the consequent avoidance of the penalty which the statute imposes." *United States* v. *Manton,* 107 F.2d 834, 838 (1938). One corollary of this principle is that "a bill of particulars cannot save an invalid indictment." *Russell* v. *United States,* 369 U.S. 749, 770 (1962).

conspiracy to defraud the United States under Section 371, whether the offense charged is within or without the statute must be determined by the "charging" provision of the indictment which defines the agreement of the parties to the alleged conspiracy as to its objects.

The central charging provision of the indictment here is paragraph (14) (App. 4, 5) which alleges a conspiracy to defraud the United States of its governmental functions and rights "hereinafter described, to wit:" Subparagraphs (a), (b), (c) and (d) then define 4 separate and independent governmental rights. Paragraph (14)(a) concerns the government's right to have its business and affairs and particularly the official business of the Department of Justice conducted honestly and impartially. Paragraph (14)(b) concerns the government's right to have its officers and employees and particularly personnel of the Department of Justice free to transact the official business of the United States unimpaired by the exercise of improper influence. Paragraph (14)(c), almost unintelligible, concerns the government's right to have the functions and duties of Johnson, an official member of the House of Representatives, exercised free from dishonesty resulting from personal and pecuniary interest in the success of Edlin, Robinson, First Colony Savings and Loan Association, First Continental Savings and Loan Association, Charles County Land Company, and Tensaw Land and Timber Company in attempting to get officials of the Department of Justice to postpone the trial of charges contained in an indictment and its eventual dismissal. Paragraph (14)(d) concerns the right of the government not to be deprived of the faithful services of Johnson as a member of the House of Representatives uninfluenced by corruption and uninfluenced by payments of money and other valuable considerations to him by other defendants as compensation for services rendered and to be rendered by Johnson

in behalf of the other defendants in relation to matters pending in the House of Representatives and for services rendered by Johnson before the Department of Justice in relation to proceedings in which the United States was directly interested.

These four stated purposes of the conspiracy are so vague, general and indefinite that under them the Government would be entitled to offer in evidence in support of the charge testimony as to any and all conduct of *any* defendant with respect to *any* matters pending before *any* administrative agency or department of the government or in the House of Representatives. Under the charging part of the First Count, the Government could introduce evidence that any defendant attempted to influence *any* executive officer of the government as to *any* matter or *any* member of Congress with respect to *any* legislation. The purposes of the conspiracy may be deemed limited only by the inchoate expression "to defraud the United States of and concerning its governmental functions" with respect to each of the four general rights specified. The alleged purposes of the conspiracy include *omnia omnibus*.

Paragraphs (15) to (25) inclusive, of the First Count allege definite matters "as a part of said conspiracy" (App. 5, 6) but these paragraphs do not purport to, nor can they, limit or restrict the charges as to the unlimited purposes of the alleged unlawful conspiracy contained in paragraph (14). These later paragraphs do not allege the purposes or objectives of the claimed unlawful agreement but allege "parts" of what the defendants supposedly did under the unlawful agreement defined in paragraph (14).

The Fourth Circuit was in error in holding that paragraphs (15) to (25) rather than paragraph 14 stated the objects and purposes of the conspiracy. 337 F.2d, p. 185.

This strained interpretation of the conspiracy count is not only repudiated by the language used but it was emphatically rejected by the government in the course of a pre-trial hearing. There the United States Attorney made clear that it was the position of the government that paragraph (14) did define the purposes of the conspiracy. He stated to the Court:

> If "there is another major area which we feel falls within the pattern of (14)(d)" it can be proven. (Tr. 29).[67] To an inquiry by the Court as to what he meant by "major area" the United States Attorney said "let us suppose that Congressmen Boykin and Johnson unbeknownst to us hire a Senator and they all went to the Vice President to try and have a speech made on the floor of the House about savings and loan associations or something" [sic] (Tr. 29). The Court later said "You were not limiting yourself to those because you are saying that in addition to those you claim the right to prove anything provable under 14". United States Attorney: "That's correct." The Court; "According to Mr. Doub you said that." United States Attorney: "Yes." The Court: "And you certainly have not disclaimed it. Now I think Mr. Doub is right that if you are not limited in any way that you could prove under 14 almost anything, under (14) (a), (b), (c) and (d)." United States Attorney: "Anything your Honor pertaining to a conspiracy among Johnson, Edlin, Boykin and Robinson, First Colony Savings and Loan, First Continental, Charles County and Leisure City and so on." The Court: "But all of them do not have to be in it. It is broad enough to cover any conspiracy between Johnson and Boykin for any money paid to either one of them to influence the vote of himself and the other on any subject that comes before the House of Representatives . . ." (Tr. 33) The Court: "There might be an appropriation bill that would bene-

[67] References here are to transcript of pre-trial hearing on December 7, 1962.

fit one of the properties owned by one of these corporations . . .'' (Tr. 33)

Thus government counsel, who prepared this indictment and knew best its intended scope, interpreted paragraph (14) as defining the purposes of the conspiracy and he was insistent that the government was at liberty in developing its proof at trial to establish any matters within the indefinite scope of paragraph (14).

Even if paragraphs (15) to (25) with their allegations as to more definite matters ''as a part of said conspiracy'' could be considered to be included in the charging provisions as to the unlawful objects of the conspiracy, these stated *parts* of the conspiracy cannot be deemed to add up to the *whole* because the government was free under paragraphs (14) to offer in evidence as *other* ''parts of the conspiracy'' any relationship of any of the defendants to *any* of the officers or employees of *any* agency of the government.

Even if the government was mistaken in its pre-trial position and the District Court and the Fourth Circuit were technically correct in concluding that paragraphs (15) to (25) stated the objects of the conspiracy, a criminal charge of a felony may not be open to such differences of opinion. If reasonable men may differ as to the interpretation of a criminal charge, if the government may interpret that charge one way before trial and a contradictory way after trial on appeal, the charge is too vague and ambiguous to meet the tests of the Fifth and Sixth Amendments. The construction of an indictment may not be treated as though it is a will or corporate trust indenture.

Since the government was not required to allege more than one overt act and such acts cannot aid the validity of a conspiracy charge, can it be said that this charge of

conspiracy with its multiple, inchoate, indefinite objectives informed Johnson of the nature of the accusation in conformity with the Fifth and Sixth Amendments? As the Ninth Circuit said in *Terry v. United States*, 7 F.2d 28, 30 (9th 1925). "Conspiracy is not an omnibus charge under which you can prove anything and everything and convict for the sins of a lifetime."

The charge as to the unlawful objects of the conspiracy was divorced from reality. The First Count of the indictment said in essence that the defendants unlawfully agreed (1) to defraud the United States and its officials of its governmental functions including the faithful services of Johnson and Boykin and (2) to defraud the United States of faithful services of the executive officers of the United States including those of the Department of Justice. It would be difficult to believe that anyone anywhere would in actuality enter into such an artificial, scholastic and metaphysical agreement. No government should be permitted under the Fifth and Sixth Amendments to declare the objects of a "conspiracy" to defraud under Section 371 in such unlimited, uninformative, slippery terms.

As a consequence of the protean character of the alleged conspiracy, at the trial there were no conceivable standards for the admission of evidence under the conspiracy charge. Nor was there any knowable standard for the determination by the District Court of the sufficiency of the evidence under the First Count. If the government had offered evidence that in June, 1960, Johnson agreed to make a speech for compensation, would it be necessary for the government to submit under the First Count *any* evidence that in 1961 he made visits to Justice for compensation? Would it be sufficient for the government to offer evidence that Johnson made visits to the Department of Justice with respect to the

pending criminal case for compensation and submit no evidence as to the speech? In this event the conspiracy to defraud charge would have to be deemed nothing more than a conspiracy to violate Section 281, the conflict of interest statute involved in the substantive counts of the indictment. Was it necessary for the government to prove knowing false representations to an official of the Department of Justice when at common law the crime of deceit and fraud has universally required such a representation?

Would it be sufficient for the government to offer evidence that Johnson was, or might have been, influenced by the $500.00 political campaign contribution made 10 days before his speech defending Maryland state savings and loan associations? The government correctly asserted in the Fourth Circuit that under the conspiracy charge *"the government certainly did not have to prove that the Congressman's sole motive in giving the speech was to receive compensation or to aid Edlin or Robinson . . ."* (Gov't Brief in the Fourth Circuit p. 42). Thus it was not necessary for the government to establish that Congressman Johnson was employed, or even consciously agreed, to make a speech in consideration of the campaign contribution made June 20, 1960, 10 days before his speech. It was enough for the jury to find that the campaign gift was an influencing factor. This position of the government, with which we agree, also made clear that the government did not even have to prove that an "antecedent agreement" was made or that Johnson was even motivated in part by the campaign contribution; it was sufficient for the jury to find that he wished to aid Edlin or Robinson. A scintilla, a peppercorn, of evidence was sufficient under Count One.

Mr. Justice Jackson said in *Krulewitch v. United States* 336 U.S. 440, 453, "A conspiracy often is proved by evidence that is admissible only upon assumption that con-

spiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . ." Here a conspiracy was proved largely by hearsay evidence that was not even admitted against Johnson (page 10 herein). Yet counsel for the government hammered these statements, which Johnson was helpless to rebut, down the throat of the jury as the most convincing evidence of a conspiracy to make a speech for compensation in disregard of the ruling of the District Judge (Tr. 421-423) and on appeal the Fourth Circuit and the government blithly treat these hearsay statements as evidence of the conspiracy (Gov't Brief, 5, 6). So we have in this case the most conspicuous confirmation of the dangers of conspiracy procedure described by this Court in *Grunewald, Krulewitch* and *Kotteakos v. United States,* 328 U.S. 750 (1946).

The issue under the First Count of the indictment charging conspiracy to defraud the United States of its governmental rights was never clearly defined. Unable to formulate for the jury a meaningful purpose of the alleged conspiracy, the District Judge was compelled to refer to its objects "as alleged in the indictment." (App. 88). The District Judge then paraphrased for the jury paragraphs 14, 15, and 16 of the conspiracy count. (App. 90-93).

Under the formless conspiracy charge, Government counsel in argument to the jury also had no standards to apply to the evidence. In final summation to the jury, the United States Attorney argued repeatedly that Johnson had a "personal interest" in his visits to Justice and therefore the jury should convict under the conspiracy count (Tr. 6192, 6196, 6197, 6225, 6230) although Congress had not made it a federal offense for a member of Congress to communicate with an executive agency with respect to a pending matter when the member had a personal interest

in it.[68] Yet Count One was sufficiently all-inclusive to permit the United States Attorney to make this argument and for the jury to create an offense which Congress had not established.

To permit an open ended indictment as was presented in the case at bar to stand would be to ". . . allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment [and] would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of fact not found by and perhaps not even presented to the grand jury." *Russell v. United States,* 369 U.S. 749, 770 (1962). See also *Smith v. United States,* 360 U.S. 1 (1959). For this reason, the Fifth Amendment has been held to mean that an indictment to be valid must leave little open to the prosecutor or court in the construction of an indictment. If the offense is not plainly charged, it becomes charged only by a process of interpretation. When this is the case, there is no assurance that the grand jury would have charged the offense which the judge or prosecutor has found lurking in a dark corner of the indictment. "If the choice of one or more out of many unidentified crimes may be made by the prosecutor, then presentment by a grand jury will have become a useless historic ritual." *Van Liew v. United States,* 321 F.2d 664, 669, 672 (5th Cir. 1963).

The guaranty of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusa-

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[68] The conflict of interest statute, 18 U.S.C. 281, made it an offense for a member of Congress to receive or agree to receive compensation for services rendered in relation to a proceeding before an administrative department.

tion; . . ." was likewise violated by Count One. "The vice of [this indictment] is that [it] failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, i.e., that [it] failed to sufficiently apprise the defendant of what he must be prepared to meet." *Russell v. United States,* 369 U.S. 749, 764 (1962); *United States v. DeBrow,* 346 U.S. 374, 377, 378 (1953); *Cole v. Arkansas,* 333 U.S. 196, 201, 202 (1948); *Berger v. United States,* 295 U.S. 78, 82 (1935); *Hagner v. United States,* 285 U.S. 427, 431 (1932); *Rosen v. United States,* 161 U.S. 29, 34 (1896); *Cochran and Sayre v. United States,* 157 U.S. 286, 290 (1895); *Potter v. United States,* 155 U.S. 438, 445 (1894); *United States v. Simmons,* 96 U.S. 360, 362 (1878); *United States v. Cruikshank,* 92 U.S. 542, 558 (1876).

In sustaining this count, the District Judge relied upon *Manton v. United States,* 107 F.2d 834 (2nd Cir. 1938) and *May v. United States,* 175 F.2d 994 (D.C. Cir. 1949) but it will be found that, although the conspiracy charge in each of these cases was broad, it was not comparable to that here. Count One of this indictment is without precedent.

The omnivorous allegations of paragraph (14) with respect to agreed efforts to obstruct governmental functions would permit the government's case to run the gamut from proof of a pact between Johnson and another party named in the indictment that Johnson would spit on a District of Columbia sidewalk to proof of a pact that Johnson would attempt the violent overthrow of the government of the United States. When an indictment is so open ended, the strictures of the Fifth and Sixth Amendments are violated.

VI

THIS COURT SHOULD REPUDIATE THE ALL EMBRACING CONCEPT OF SECTION 371 SOUGHT BY THE GOVERNMENT

A

The government did not elect to charge Johnson in the indictment with conspiring to commit an offense against the United States as authorized by Section 371. The indictment did not charge him with conspiring to commit any substantive offense established by the Congress, including Section 281, the conflict of interest statute involved in the substantive counts of the indictment or Section 205, the bribery statute. Instead the government elected to charge Johnson with conspiracy to defraud the United States of its governmental functions and of his faithful services under Section 371 as interpreted in *Haas* v. *Henkel,* 216 U.S. 462 (1910) and *Hammerschmidt* v. *United States,* 265 US 182 (1924).[68a]

Both the District Court and the Fourth Circuit relied on *Haas* and *Hammerschmidt* in sustaining the validity of the conspiracy charge. The District Judge's instructions to the jury paraphrased the *Hammerschmidt* dictum (265 U.S. at 188) as to the meaning to be accorded "defraud the United States".[69]

[68a] In *Glasser v. United States,* 315 U.S. 60 (1942) the *Haas* and *Hammerschmidt* interpretation was not challenged.

[69] "The language of this statute forbids an illegal agreement to defraud the United States in any manner or for any purpose. It has been legally decided by the courts, and I so instruct you, that the phrase 'defraud the United States in any manner or for any purpose' is not limited merely to conspiracies to deprive the United States of money or property or other things of pecuniary value. It also comprehends the right of the government not to be defrauded of the unbiased, independent, faithful, loyal services of its employees, including Congressmen, and that its legitimate official action shall not be defeated by misrepresentation, chicanery, overreaching trickery, or by means that are dishonest." (App. 89, see also 92).

Johnson earnestly requests this Court to reconsider the expansive interpretation accorded the "defrauding" provision of the conspiracy statute (18 U.S.C. Sec. 371) in *Haas* and in the dictum in the opinion of Chief Justice Taft for the Court in *Hammerschmidt*.

Sec. 371 made it an offense for two or more persons to conspire to commit an offense against the United States or to defraud the United States in any manner or for any purpose. This Section was adopted in 1867, as a result of clamor for the repression of tax violators and it was included in a 34-section statute designed to plug loopholes in the tax laws.[70] The conspiracy provision, then Section 30, was added to the House Bill by the Senate without any explanatory reference appearing in the hearings and reports. Section 30 was enacted at a time and in a setting strongly suggesting that it was primarily aimed at conspiracy to commit offenses against the revenue and to defraud the United States of its revenue.[71] In view of the general language of the defrauding provision, the Supreme Court in *United States* v. *Hirsch*, 100 US 33 (1879) expanded the meaning of the word "defraud" to include fraud "against the coin" or "cheating the government of its land or other property."

In *Hammerschmidt* the Court defined the prohibited object of a conspiracy as cheating the government out of property or money and secondarily as obstructing lawful governmental functions by deceit, craft, trickery, "dishonest means" or "overreaching."[72]

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[70] The history of the provision is traced in Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, (1959); see also *United States* v. *Gradwell*, 243 U.S. 476, 481 (1917).

[71] *United States* v. *Allen*, 24 Fed. Cas. 772 (C.C.E.D.N.Y. 1868); *United States* v. *Thompson*, 29 Fed. 86, 87 (C.C. Ore. 1886).

[72] The language used in the earlier *Haas* case, 216 U.S. 479-80 is also incredible in its expansive reading of the statute: ". . . The statute

A statute which in general terms creates a criminal offense should be interpreted in accordance with the usual and ordinary meaning of the words used. "Fraud" and "defraud" have traditionally and universally involved the cheating of another out of his money or property by misrepresentation, deception, deceit or trickery. When this Court indicated in *Hammerschmidt* that "conspiracy to defraud" also meant conspiracy to obstruct governmental functions by deceit, "dishonest means", "overreaching", the Court made a drastic departure from the customary meaning of the words used by the Congress and thus expanded this penal conspiracy statute far beyond its plain meaning. Indeed the Court's effort to expand the statute to the obstruction of governmental functions is unparalleled distortion of language.

"The obstruction of lawful, governmental functions" has no definable meaning. It affords no standard for the application of the command of the statute. The legislative command of a penal statute must be understandable by those to whom it is addressed,[73] but the language of the command, as in-

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is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government. . . . [I]t must follow that any conspiracy which is *calculated to* obstruct or *impair its efficiency* and destroy the value of its operations and reports as fair, impartial, and reasonably accurate, would be to defraud the United States . . ." (Emphasis supplied).

[73] "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926). See also *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). *United States* v. *Spector*, 341 U.S. 169, 171 (1952) ". . . [A] statute, plain and unambiguous on its face, may be given an application that violates due process of law. . . ."

terpreted by Chief Justice Taft, is not definite enough to be intelligible. "Dishonest means" and "overreaching" have no more meaning in law than "sinful", "wicked", or "unethical." Such indefinite words are inherently subjective and merely express whatever happen to be current notions of unethical or "bad" conduct. Such vagaries and indefiniteness—not in the penal statute but in the gloss put upon the statute by the judiciary—does not meet contemporary Sixth Amendment standards that an accused be informed of the nature of the accusation against him. If Congress had embodied in the statute the vague expansive definition of conspiracy to defraud the United States contained in *Hammerschmidt*, its unconstitutionality as a violation of the Sixth Amendment and due process would seem apparent.

The *Hammerschmidt* broadside dictum not only expands Section 371 beyond sensible limits but it casts the judiciary in the impossible position of attempting to develop upon a case by case basis an unpublished penal code of ethics by judicial fiat without according any recognition to the legislative responsibility of the Congress. This is a task outside the bounds of judicial interpretation for it is better for the Congress, and in accord with its functions, to revise the statute than for the Court to guess at the revisions it would make. That task Congress can do with precision; the Court can do no more than make speculative law.[74]

It is for the legislative branch to say what acts are to be treated as criminal and the courts have no roving commission to declare agreements criminal or against public policy according to their subjective moral concepts of what is expedient for the welfare of the State. Lord Halsbury in *Janson v. Driefontein Consol. Mines, Ltd.* (1902) A.C.

[74] *United States v. Evans*, 333 U.S. 483, 495 (1948).

484, 490. Yet that is precisely the interpretation which the Government seeks this Court to accord the conspiracy statute.

The unfortunate *dictum* of *Hammerschmidt* violated several of the Supreme Court's most often repeated canons of statutory construction. A criminal statute must be interpreted strictly and any doubt resolved in favor of the accused.[75] Before one can be punished under the federal law, his case must be "plainly and unmistakenly" within the provisions of a statute.[76] The approach of the government seeking a shadow-land area as a trap for the unwary is ". . . the very negation of a fundamental tenet of criminal law in the western world: that no one can be punished for conduct which had not been legislatively defined and classed as a crime in advance of its commission."[77]

> "A criminal statute is to be construed strictly, not loosely. Such are the teachings of our cases from

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[75] The principle has been expressed in numerous decisions of this Court. *United States* v. *Boston & M. R.R.*, 85 S. Ct. 868 (1965); *Yates* v. *United States*, 354 U.S. 298 (1957); *Smith* v. *United States*, 360 U.S. 1, 9 (1959); *Williams* v. *United States*, 341 U.S. 97, 101 (1951); *United States* v. *Alpers*, 338 U.S. 680, 681 (1950).

[76] *United States v. Gradwell*, 243 U. S. 476, 485 (1917); quoting *United States* v. *Lacher*, 134 U.S. 624, 628 (1890).

[77] Goldstein, p. 444. The Conclusions of the International Commission of Jurists on the Rule of Law In A Free Society, New Delhi, India, January 5-10, 1959, included "the definition and interpretation of the law should be as certain as possible, and this is of particular importance in the case of the criminal law, where the citizen's life or liberty may be at stake." "The Rule of Law requires . . . that he [an accused person] should be given notice of the charge with sufficient particularity." "No person of sound mind shall be deprived of his liberty except upon a charge of a specific criminal offense." International Commission of Jurists, *Executive Action and the Rule of Law*. pp. 9, 11, 19. (Geneva). See also pp. 62, 64, 67, 68, 73, 108, 109-111, 114-117.

United States v. Wiltberger, 5 Wheat 76, down to this day. Chief Justice Marshall said in that case: 'The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.' Id., 95.

The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition. *United States v. Weitzel,* 246 U.S. 533."

Under Section 371 a conspiracy to do a lawful act is not illegal. A conspiracy to commit an act reprehensible in the forum of good morals is not an indictable conspiracy. The incredible expansion of the conspiracy to defraud part of Section 371 beyond conspiracy to defraud the government of its property and coin to conspiracy to defraud the government by obstructing governmental functions has made the unlawfulness of conduct depend upon *post hoc* subjective judgments by the judiciary and the triers of fact. Under the guise of enforcing this statute the courts are in reality creating federal offenses which have not been established by Congress.

If the government had charged a conspiracy to violate a statute creating a substantive offense such as Section 281, the conflict of interest statute, or Section 205, the bribery statute, the charge would not only have been clearly authorized by the Congress but would have been intelligible and knowable and the trial would have proceeded subject to recognizable legal principles.

If Johnson had been charged with conspiring to commit the substantive offense of Section 205 he would have been entitled to contend that there was no evidence that he con-

spired to accept a bribe to influence "his vote, act or decision in any question, matter, cause or proceeding which may at any time be pending in either House." (18 U.S.C. 205). If he had been charged with conspiring to violate Section 281, government counsel could not have argued to the jury that he had a "personal interest" in his visits to Justice. (see page 83 herein). Thus the government used the conspiracy to defraud provision of Section 371 to circumvent the limitations of Sections 205 and 281.

The development of conflict of interest penal statutes with respect to the executive officers of the government has been one of the most difficult and perplexing tasks of federal and state legislators.[78] That task as applied to members of the Congress and state legislators, elected representatives of the people, has been even more difficult and perplexing because additional problems are involved which are not incident to conflict of interest as applied to administrative officers and employees.[79] To allow the executive and judiciary free license to resolve this dilemma on an *ad hoc* basis as has been attempted in the case at bar by ignoring in the conspiracy count section 281, the sole legislative pronouncement in the area, is contrary to every known tenet of fairness in criminal law. What could be a sharply focused charge in the best tradition of criminal law, becomes a vague, amorphous accusation, its boundaries unknown and unknowable.

It is beyond belief that in enacting the conspiracy statute in 1867 as a part of a revenue measure Congress could have intended to permit the executive power, abetted by the judiciary, to roam at large in the area of ethics, conflicts of

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[78] See generally, Conflict of Interest and the Federal Service, Chapter III.

[79] *International Assoc. of Machinists v. Street*, 367 U.S. 740 (1961).

interest and loyalty. To permit such meandering is to allow a substitution of judicial for congressional judgments as to these sensitive and delicate areas. To allow a jury to infer a criminal "conspiracy" to defraud the United States by obstructing governmental functions means that a jury must determine far more than that there was a conspiratorial agreement within established legal principles. The jury must decide that the objective of the agreement was to defraud the United States by obstructing governmental functions or their efficiency (*Haas*) or by depriving the government of the faithful services of its officials by dishonest means. *(Hammerschmidt)* This elegant language means that a judge or jury may apply their own notions of ethics, propriety and loyalty in determining a defendant's guilt.

In recent years the Supreme Court has taken cognizance of the menace to individual liberty incident to indictments for conspiracy and has expressed in the most emphatic way its concern as to basic constitutional values threatened by this "darling" of the prosecution. The Court's criticism has been particularly intense with respect to conspiracy charges where prosecution for the substantive offense is possible but the government has included a conspiracy charge to afford it major tactical advantages. *Kotteakos* reversing a conspiracy conviction. In *Krulewitch* (p. 446) reversing a conspiracy conviction, Mr. Justice Jackson said, "The modern crime of conspiracy is so vague that it almost defies definition." "The modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the Court of the Star Chamber" (p. 450). "Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice." In *Grunewald v. United States,* 353 U.S. 391, where a conspiracy con-

viction was reversed, the Supreme Court cited Justice Jackson's opinion in *Krulewitch* with approval. See also: *Paoli v. United States,* 352 U.S. 232 (1957) (dissenting opinion of Justices Frankfurter, Black, Brennan and Douglas); *United States v. Falcone,* 109 F.2d 579, 581 (1940) 2d Cir. Judge Learned Hand).[80]

This Court's ill-considered expansion of the conspiracy statute far beyond the limits of logic, reason and its own principles is at war with the contemporary recognition by the Court of the dangers inherent in a conspiracy charge. Criticism by legal scholars of the judiciary's expansion of the defrauding portion of the conspiracy statute has been justifiably virulent.[81] In its anxiety to reach any kind of "unethical" conduct involving officers and employees of the government, this Court in *Haas* and *Hammerschmidt* deprived the defrauding part of Section 371 of any ascertainable meaning. The command of the penal statute became an open ended, floating, indefinable protean prohibition of conduct which might in the future, by the current

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[80] For other criticisms of the law of conspiracy see O'Doughtery, *Prosecution and Defense Under Conspiracy Indictments,* 9 Brooklyn Law Rev. 263 (1940); Sayre, *Criminal Conspiracy,* 35 Harv. L. Rev. 393, 425 (1922); Goldstein, *Conspiracy to Defraud the United States,* 68 Yale Law Journal, 404 (January 1959); *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants,* 62 Harv. L. Rev. 276, 283-84 (1948); Note, *Criminal Conspiracy: Bearing of Overt Acts upon the Nature of the Crime,* 37 Harv. L. Rev. 1121, 1123 (1924); Klein, *Conspiracy—The Prosecutor's Darling,* 24 Brooklyn L. Rev. 1, 405 (1957); Note, *The Conspiracy Dilemma,* 62 Harv. L. Rev. 276, 278-79 (1948); Note, *Guilt by Association,* 17 U. Chi. L. Rev. 148, 153 (1949); Report of the Conference of Senior Circuit Judges in 1925, Chief Justice Taft presiding; Darrow, *The Story of My Life,* 64, 144-145; Kenny, *Outlines of Criminal Law,* Sec. 454; O'Brien, *Loyalty Tests and Guilt by Association,* 61 Harv. L. Rev. 592, 599-600 (1948).

[81] See note 80.

standard of ethics or loyalty, be deemed undesirable. Such a concept of crime is not only at variance with basic principles of ordered liberty but is an uncomplimentary reflection upon the competence of the Congress to declare and define by legislative act what is a criminal offense.

The sensible limitation of the "defrauding" provision of Sec. 371 sought by Johnson, would not hamper the prosecutor's law enforcement activities. Analysis of the cases applying the *Haas* and *Hammerschmidt* rationale indicates that virtually all of them involved acts punishable an an "offense" against the United States.[82] Almost all were subject to prosecution under the part of the statute which proscribes conspiracy to commit "any offense against the United States."

Under the interpretation of Section 371 in *Haas* and *Hammerschmidt* the federal police have been vested with license to interfere with the freedom of action of practically every individual.

> "[T]his is no longer a time when anti-social conduct so outstrips the available crimes that a catch-all crime is essential in order to deter persons particularly at the federal level from approaching the outer limits of criminality. Indeed today's detailed federal criminal code reaches so broad a range of anti-social conduct, and in such overlapping fashion that multiplicity of catagories, not sparseness of catagories, is the essential problem. Further Congress sits in almost continuous session ready to act on recommendations for criminal legislation from the multitude of federal agencies dealing with all approaches of our national life. The rapidity with which curative legislation can be enacted makes it unlikely that many persons will long escape

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[82] Goldstein, *Conspiracy*, p. 436-411.

prosecution for conduct deemed objective to societal norms".[83]

Thus it would seem that continued reliance on *Hammerschmidt* is a prosecutor's apron string which can be painlessly severed. It should be put to rest with dispatch.

B

If this Court concludes that it is constrained to follow *Hammerschmidt* and *Haas*, it is submitted that the accusations as to the speech made in the pending case are not within their scope. The essential components of even the subsidiary meaning of conspiracy to *defraud* under those cases are (1) obstruction or interference with a lawful governmental function *and* (2) fraud, deceit, craft, etc. Mr. Johnson's alleged collaboration with others in the preparation of his speech, his delivery of the speech for an alleged gift and his ordering of copies from the Government printing office for publication cannot be deemed an obstruction or interference with any lawful governmental function. It is apparent that this Court in *Haas* and *Hammerschmidt* had in mind obstructions, or interference, with the conduct of the executive or judicial departments of the government, but, if the *dictum* were expanded to encompass obstructions of the conduct of the legislative branch, by no process of reasoning may the accusations as to the Johnson speech be deemed an obstruction, or interference with, the functions of the House of Representatives or any business of the House. This speech, unrelated to pending legislation, did not even remotely affect the functioning of the House. Fraud, deceit,

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[83] Goldstein, *Conspiracy*, p. 462. Virtually all of the major regulatory statutes contain at least one provision making it a crime to violate other provisions of the statute.

and craft involve false statements or misrepresentation and no false statement or misrepresentation was alleged or proven.

As to the claim of the Government at the trial that the acceptance of a political compaign gift in connection with a speech is "dishonest" and so within *Hammerschmidt*, we wish to point out that another part of that opinion disclaims that all dishonest acts are includable in the statute (p. 188). The opinion does suggest that bribery of an "official" is within the statute but an elected member of Congress cannot be deemed to be a government official because the relationship of the government to a legislator is not that of employer and employee.[84] A member of Congress has no duties outside of Congress and he has no duties within his chamber except those which arise out of his right to vote and to speak. *Montefiore v. Menday Motor Components Co.* (1918) 2 K.B. 241.

We submit that, under the most liberal interpretation of the *Hammerschmidt Obiter*, alleged "unethical" or "dishonest" or "overreaching" speech in the Congress is not within its ambit and for this Court to hold that the accusations by the Government with respect to Mr. Johnson's speech in the House contained in Count One of the indictment, and the evidence under Count One, are within the scope of the conspiracy statute, it must further expand the criticized and ill-conceived words of *Hammerschmidt* beyond rational limits.

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[84] Manning, *Federal Conflict of Interest Law*, 78-79 (Harvard, 1964) and Yankwich, *The Immunity of Congressional Speech*, 99 U. of Pa. Rev. 960, 975.

VII

THE FOURTH CIRCUIT CORRECTLY HELD THAT THE EFFECT OF THE UNLAWFUL CONSPIRACY CHARGE WAS SO PREJUDICIAL AS TO REQUIRE REVERSAL UNDER THE SUBSTANTIVE COUNTS.

The Fourth Circuit concluded:

> "... the invalidity of count one as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts. Many of the events testified to at the trial related only to the speech. It was introduced into evidence and its authorship, contents, motivations and accuracy made the subject of extensive inquiry. The conclusion is unavoidable that this mass of evidence and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflicts of interest counts. The judgment against Johnson is therefore vacated and the case remanded for a new trial on the counts charging violations of 18 U.S.C.A., Sec. 281. . . ." (337 F.2d at 204)

Although the government reserved this question in its Petition for Certiorari (Pet. p. 11), the government has not questioned in its Brief in this Court the correctness of this conclusion of the Fourth Circuit.[85] Nor did the government contest our position as to this in its brief in the Fourth Circuit.

The trial of this case involved in large part the accusations contained in the conspiracy charge and we estimate that not less than 70% of the testimony related to its charges. Its broad scope enabled the government to put in evidence a vast amount of testimony which would not

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[85] The Government has only argued that the evidence under the conspiracy charge as to the speech did not violate the Speech and Debate clause. (Gov't Brief pp. 16, 17).

have been admissible under the substantive counts. The extensive testimony relating to events in the year 1960 would seem to bear no relationship to the charges of the substantive counts that Johnson accepted specific checks as compensation for his visits to the Department of Justice after February 1961. This 1960 material included Johnson's speech of June 30, 1960, discussions about the speech, its preparation, motivation and content, the $500.00 campaign contribution of June 20, 1960, the orders for the reprints of the Speech, its distribution, a retainer of $1,000.00 paid Johnson by Robinson on August 30, 1960, for future legal services for the savings and loan associations, a political campaign contribution of $300.00 on 1960, and Johnson's legal services for the savings and loan associations in the fall of 1960 and the winter of 1960-61.

The testimony of numerous witnesses related to Johnson's speech of June 30, 1960, and a mass of evidence came in under the conspiracy charge with respect to Boykin's substantial land transactions in southern Maryland and Virginia. See note 59 page 67 herein. The extensive jury arguments of government counsel related principally to the evidence which they claimed supported conviction under the conspiracy charge (Tr. 6218-6221, 6225-6228).

As the Court of Appeals held, the substantive counts cannot be divorced from the all-persuasive conspiracy charge and the evidence submitted under it. That unlawful charge was so prejudicial and deadly that this Court may not conclude that it did not influence the jury as to the substantive counts. *Kotteakos v. United States,* 328 U.S. 750, 764, 765. "Proof that the Plaintiff in error was guilty of another crime was in itself prejudicial." *Terry v. United States,* 7 F.2d 28 (9th Cir. 1925); *Tipton v. Socony Mobil Oil Co.,* 375 U.S. 34 (1963); *Hawkins v. United States,* 358 U.S. 74, 79 (1958).

The standard in *Kotteakos* (page 765) to be applied in deciding whether substantial error requires reversal is that ". . . if one cannot say, *with fair assurance,* after pondering all that happened without stripping the erroneous action from the whole that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."[85a]

The Fourth Circuit has unanimously held that the invalid conspiracy charge and the evidence submitted under it "was obviously prejudicial to his [Johnson's] right to the unbiased consideration of the jury on the remaining counts." The government did not claim otherwise in the Fourth Circuit and has not done so here. No one could say with "fair assurance" that the judgment under the substantive counts was *not* infected by the unlawful conspiracy charge and the evidence submitted under it.

PART TWO

IMPORTANT ISSUES ERRONEOUSLY RESOLVED BY THE FOURTH CIRCUIT IN FAVOR OF THE GOVERNMENT

Affirmance by this Court of the decision of the Court of Appeals as to the invalidity of the conspiracy charge will mean that Johnson may be retried by the Government under the substantive counts. It would seem imperative therefore for this Court to consider and review certain adverse and erroneous decisions by the Court of Appeals

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[85a] The Court in *Kotteakos* pointed out that the standard to be applied when a constitutional right has been denied might be even more liberal: "If, when all is said and done, the conviction is *sure* that the error did *not* influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." at page 764-65, citing *Bruno v. United States,* 308 U.S. 287 (1939), and *Ballard v. United States,* 329 U.S. 187, 195 (1946).

for the guidance of the District Court.[86] Otherwise upon a new trial they will be binding upon the District Court. Accordingly counsel for Johnson deem it necessary to submit these issues here in order that upon a retrial Johnson may be accorded the rudiments of a fair trial.

I

THE DISTRICT COURT WAS IN ERROR IN REFUSING JOHNSON ACCESS TO THE TRANSCRIPT OF ALL TESTIMONY BEFORE THE GRAND JURY WHICH INDICTED HIM WHEN THE GOVERNMENT HAD BREACHED THE "SEAL OF SECRECY" IN VIOLATION OF CRIMINAL RULE 6(e).

At the opening of Court on the first day of trial, counsel for a co-defendant advised the Court that an entire volume of grand jury testimony containing the testimony of various witnesses had been made available to a prospective witness and his attorney by the United States Attorney in violation of Rule 6(e) of the Federal Rules of Criminal Procedure[87] which requires court action for

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[86] If this Court sustains the conspiracy charge, Johnson would also seem to be entitled to have this Court review these questions.

[87] Rule 6(e): Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

such a breach of the secrecy of grand jury proceedings (Tr. 4, 6). Counsel for the co-defendant moved that the Court release all grand jury testimony to the defendants and allow reasonable time for defense counsel to study the grand jury testimony prior to the beginning of the trial (Tr. 6). This motion was adopted on behalf of Johnson (Tr. 17).

The United States Attorney admitted of record to the Court that the volume of grand jury testimony containing the testimony of Mr. Finneran, Mr. Shoultise and others had been given to Mr. Finneran and his attorney (Tr. 8-10). At the very least permission was granted to examine the testimony of Mr. Finneran and Mr. Shoultise. Had permission to examine the other testimony in the volume been requested, such permission would have been granted (Tr. 10). The Government did not challenge the representation to the Court by counsel for Johnson's co-defendant that Mr. Finneran and his counsel had read the testimony of Mr. Dixon, Mr. Shoultise, Mr. Wechsler and Mr. Finneran (Tr. 4-5). They had the opportunity to do so because they had been left alone in a room with the volume of the grand jury transcript (Tr. 21).

The defendants' motion was denied. On the "tit for tat" theory the District Court merely made available to defense counsel the one volume of grand jury testimony, the secrecy of which was breached by the government (Tr. 61-66). The Fourth Circuit found no error in this ruling (337 F.2d 196-98).

A

The Grand Jury Transcript Should Be Available to the Accused After His Indictment

The "seal of secrecy" of Grand Jury proceedings in the United States is an anomaly in the administration

of criminal justice in western civilization. Under the civil law of Western Europe and Latin America, the function of a Grand Jury is performed by a *Judge d'instruction* and, if this investigating judge finds probable cause and authorizes a criminal prosecution, defense counsel are entitled to access to his entire file including all statements of witnesses. In England where the Grand Jury has been abolished, its function is performed by a judge at a preliminary hearing and the accused has full access to all testimony adduced at that hearing.

This Court's refusal in *Pittsburgh Plate Glass v. United States,* 360 U.S. 395 (1959), a 5-4 decision, to give Section 6(e) sufficient scope to be of real value in discovery has been widely condemned for its uncritical exaltation of secrecy for secrecy's sake.[88] The fact that the expressed classic values of grand jury secrecy do not withstand analysis when applied after indictment is especially disturbing when it is recalled that lack of opportunity to adequately prepare a defense may result in a conviction in a case, where, had all of the facts been known to the defendant, the conviction would not have been obtained. With commendable candor,

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[88] Mr. Justice Brennan, said for himself, the Chief Justice, Mr. Justice Black and Mr. Justice Douglas, "The court's insistance on secrecy exalts the principle of secrecy for secrecy's sake . . ." 360 U.S. at 407.

Goldstein, *The State and the Accused: Balance of Advantage and Criminal Proceedings;* 69 Yale L.J. 1149 (1960); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy,* 48 Va. L. Rev. 668, 647 (1962); and Calkins, *Grand Jury Secrecy,* 63 Mich. L. Rev. 445 (1965) all contend that a wider scope to criminal discovery including discovery of grand jury minutes is called for. Two state cases taking a liberal view of discovery of grand jury minutes are *Utah v. Faux,* 9 Utah 2d 350, 345 P.2d 186 (1959) and *State v. James* (Mo.) 327 S.W. 2d 278 (1959). Also contending for a wider scope to discovery of grand jury minutes is the report of the grand jury committee of the Criminal Law Section of the American Bar Association, August 10, 1963.

four out of 14 United States Attorneys surveyed admitted that there were cases the defense would have won had more discovery been allowed the defendant.[89] The American Bar Association Special Committee on Federal Rules of Procedure has recommended to the Judicial Conference of the United States that *disclosure be required* of grand jury minutes after indictment.[89a] All of these factors suggest that there is something amiss in the present administration of federal criminal justice.

The reasons given in *Proctor & Gamble* for secrecy were as follows:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors: (3) to prevent subornation of perjury or tampering with the witness who may testify before grand jury and later appear at the trial of those indicted by it: (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was no probability of guilt".[90]

Once the grand jury indictment has been brought and the accused arrested these five reasons lose all merit.

When an indictment has been brought and the accused has been arrested the inapplicability of the first reason,

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[89] Survey taken by the Junior Bar Section of the District of Columbia for the Judicial Conference of the District of Columbia, Circuit, May, 1963, reported 33 F.R.D. 47, 101 at 118. Twelve of seventeen defense lawyers surveyed stated there were cases the defense would have won with more discovery.

[89a] Transmitted to the Judicial Conference by resolution of the American Bar Association by letter of August 18, 1965.

[90] 356 U.S. at 681.

fear of the escape of the accused, is apparent. The second reason, non-interference with the delicate deliberations of the grand jury, also becomes irrelevant when the indictment has been delivered. It is not the deliberations of the grand jury nor the record of the votes of the grand jurors which is sought. That is a *secula seculorum* which remains inviolate. It is only testimony given before the grand jury that is sought.

The danger that witnesses will be tampered with—the fear of subornation of perjury by the defendant—, the third reason proffered by the Court, likewise can have no place after the indictment has been brought. The danger that witnesses will be tampered with before they testify at trial should be lessened rather than heightened when the defendant has knowledge of the fact that the witness has already gone on record as to the facts of the case. The fear of perjury as a result of additional discovery has been emphatically repudiated by the contrary experience of discovery in the civil field.[91] In addition this

[91] Mr. Justice Brennan, speech in a symposium at the Judicial Conference of the District of Columbia Circuit, 33 F.R.D. 47, 56 at 62 (May, 1963): "I must say, in any event, I could not be persuaded then and I cannot now, that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, supports the case against criminal discovery. I should think, rather, that is complete fallacy has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been allowed and, so far as I know, no one suggests that perjury has been fostered. Indeed, the experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication. Surely that experience is solid evidence of the beneficial results of discovery to the cause of justice without the defeat of justice through perjury foretold by the prophets of doom. In any event, as has been said, 'The true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other where both are present.'"

reason makes the insulting supposition that members of the bar who represent the state may be trusted, but members of the bar who represent defendants will suborn perjury or tamper with witnesses.[92] This inference assumes that the defendant is in fact guilty until he proves himself innocent, thus contradicting the most basic notion of criminal justice in the United States.[93] Any reason predicated upon such an assumption is abhorent to the cause of liberty and justice.

The fourth reason, encouragement of disclosure before the grand jury is, of course, irrelevant at the trial stage of the proceedings if it is ever valid at all. Witnesses may be subpoenaed at both the grand jury and trial stage of the case. It is vital to the cause of justice that the facts be brought out at trial. If information beneficial to the cause of the defense is not brought to the attention of the accused and his counsel, then a grave injustice has been done.[94]

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[92] Brennan, *ibid,* at 63.

[93] Goldstein, *Balance of Advantage,* at 1193.

[94] The fact that problems will arise in particular cases where it will be required that portions of the grand jury transcript be kept secret is no reason to doubt the general validity of the argument. As Professor Goldstein suggests, the "concept of the protective order" of section 30 (b) of the Federal Rules of Civil Procedure may well be applied to criminal discovery. *Balance of Advantage.* Mr. Justice Brennan's comments on this problem are as follows:

"The extent to which discovery should be allowed in particular cases will, of course, present complex problems. There will be questions for the exercise of sound discretion depending upon the particular materials of which discovery is sought. The showing of need of a given accused may require discovery, I think, despite strong governmental interests advanced by the prosecution against allowing it. In other words, there will be much need for the striking of a proper balance in individual cases. Surely arguments of the prosecution that, for example, witnesses might be imperiled are not wholly illusory. And to the extent discovery of the accused may be sought by the prosecution,

The fifth reason stated by the Supreme Court, protection to one who is exonerated by the grand jury, is entirely inapposite where an indictment has in fact been brought.

The most convincing evidence that the reasons for grand jury secrecy are spurious is the experience of those jurisdictions, including California, Iowa, Kentucky, and Minnesota, which require full disclosure of the transcript of grand jury testimony.[95] "[p]erhaps most jurisdictions are reluctant at this time to liberalize their rules of discovery

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there will necessarily lurk below the surface constitutional questions arising from the privilege against self-incrimination. In short, there are problems that argue not only for judicial discretion but perhaps, for even a greater measure of discretion than has been found necessary in the area of civil discovery.

"I do not deny the force of the objections which have been raised against expanded criminal discovery. All I have attempted to suggest this morning is that these objections, if not wholly invalid, are simply not insurmountable. In any event, I have great difficulty accepting them as reasons for refusing to allow criminal discovery under appropriate judicial safeguards. Where dangers do exist and abuses are threatened, not denial of discovery but appropriate safeguards to prevent such dangers and abuses should, I think, be our effort. We found out that the civil discovery procedures could be abused, and we fashioned safeguards against those abuses. The court-made rules protecting the attorney's work product and enforcing privileges against disclosures of confidential or secret information are examples. If there is merit in the insistence that the public interest in law enforcement requires even stronger safeguards against unwarranted disclosure of the prosecution's case, surely appropriate sanctions can be devised. In the rare case, the denial of all discovery may be compelled to protect the safety of witnesses or prevent an apparent perversion of the judicial process. But I would leave the primary responsibility with the trial judge under such guidance from appellate courts as may be necessary to mark its proper limits. I do submit that the gain to the public interest in the pure and just administration of the criminal law is well worth the risks."

[95] See Cal. Pen. Code Sec. 938.1; Iowa Code Sec. 772.4 (1962); Ky. Crim. Code Sec. 110 (Baldwin, 1953); Minn. State Ann. Sec. 628.04 (1947).

to the extent of permitting pretrial inspection of grand jury minutes, but the experience of those that have demonstrates that no vitality is drained from the effort or success of the state in its prosecution of criminals.''[96]

The benefits of discovery in ". . . notice-giving, issue-formulation and fact-revelation . . .''[97] are at least equally applicable in the criminal field as in the civil.[98]

"If a procedural system is to be fair and just, it must give each of the participants to the dispute the opportunity to sustain his position. It must not create conditions which add to any essential inequality of position between the parties, but rather must assume that inequality be minimized as much as human ingenuity can do so. * * * If the trial is to be the occasion at which well prepared adversaries test each other's evidence and legal contentions in the best tradition of the adversary system, there can be no substitute for a deposition, discovery, and pretrial procedure.''[99]

The rationale of the secrecy requirement is negated by the philosophy of *Jencks v. United States,* 353 U.S. 657 (1957). Although this Court has held that the *Jencks* rule

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[96] Calkins, at 469.

[97] *Hickman v. Taylor,* 329 U.S. 495, 500 (1947).

[98] See the authorities cited in note 112. Even in *United States v. Proctor & Gamble,* 356 U.S. 677, 682-683 (1958), where the Court denied discovery of grand jury minutes to the defendant in a civil case this Court paused to point out that "Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor* . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. Only strong public policies weigh against disclosure."

[99] Goldstein, *Balance of Advantage* at 1192-93.

does not apply to grand jury minutes,[100] it surely is apposite as a rule of fairness.[101]

Formally recorded testimony before a grand jury ". . . an appendage of the court . . ."[102] would seem to have a greater claim to disclosure than informally recorded statements of a government witness as to what was said long in the past.[103] Also in point is the decision in *Brady v. Maryland*, 373 U.S. 83 (1963) holding that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material to guilt or to punishment.

The guiding principle in *Brady* and *Jencks* is that of fairness to the accused. In *Jencks*, this Court (quoting from another leading decision), said:

> ". . . the Government can invoke its evidentiary privilege only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes the accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense."[104]

It is respectfully submitted that the goal of fairness to the accused—of equal opportunity to the accused and the prosecution as articulated in *Jencks* and *Brady*—impel

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[100] *Pittsburgh Plate Glass v. United States*, 360 U.S. 395, 398 (1959).

[101] Calkins at 481; Sherry at 671; Goldstein, *Balance of Advantage* at 1184 fn. 116.

[102] *Brown v. United States*, 359 U.S. 41, 49 (1959). The proceedings before a grand jury constitute a ". . . judicial inquiry . . ." *Cobbledick v. United States*, 309 U.S. 323 (1940), 1327 quoting *Hale v. Henkel*, 201 U.S. 43, 66 (1906).

[103] See *infra*.

[104] *U.S. v. Reynolds*, 345 U.S. 1 at 12 (1953) as quoted in *Jencks v. United States*, 353 U.S. at 671.

the conclusion that the unnecessary veil of secrecy surrounding the grand jury transcript in the case at bar should fall.

B

On the Facts of This Case Johnson Was Entitled to Access to the Grand Jury Testimony

When the government has breached the secrecy of the grand jury as government counsel did in this case, an unfair advantage would result if a defendant were not entitled to the entire grand jury transcript. The advantage to the prosecutor of the opportunity to pick and choose as to which parts of the grand jury transcript will be opened up contrary to the direction of Section 6 (e) could well be a vital factor in shifting the balance of advantage in a criminal prosecution even further against the accused.[105]

The facts of this case illustrate methods by which advantage may be gained by the prosecution.[106] A witness is shown testimony of others given *before the grand jury.* These words are emphasized because the fact that the testimony shown the prospective witness is Grand Jury testimony is, in itself, significant to the witness. Why? Because the government hopes to use the testimony of that witness and to reinforce his confidence and thus make him a more credible witness in the eyes of the trial jury or because the government hopes that, when he and his counsel read the testimony of others, they will not wish to contradict them. Or a witness is shown his own testimony before the grand jury as to which his memory has

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[105] *Cf.* Goldstein, *Balance of Advantage* at 1152.

[106] The advantages gained by the prosecutor's pre-trial breach of secrecy do not apply when the government is permitted to impeach a witness at trial by his grand jury testimony.

become hazy in the hope that his memory will be jogged along certain preferred lines.[107]

If the accused has the same advantage of making use of the grand jury transcript, he would have the opportunity to take similar action as to the testimony before the grand jury which may be favorable to him. Thus the balance of advantage which seems to have been shifted so heavily against the accused by the prosecutor in violation of the requirement of Sec. 6 (e) would be righted. In other words a sound rule should mean that the defendant gets to look not only at the discards but rather that he is given an opportunity to play the same game himself.

The tit-for-tat notion applied by the District Court and approved by the Fourth Circuit is unsound in theory and practice. If a government witness or his counsel or both read a volume, a page or a paragraph of the transcript, under this vagary, defense counsel may do so. This rule puts the government in the anomolous position of being able to treat recorded grand jury testimony of witnesses as its private property when in fact it is the property of the court, to violate Rule 6 (e) and the vaunted "seal of secrecy" in its discretion at will with the knowledge that there is only a limited disclosure consequence. It enables the prosecution deliberately to disregard Rule 6 (e) without an adequate sanction.

It is therefore submitted that in this case the defense met the burden of *Pittsburgh Plate Glass v. United States*, 360 U.S. 395, 400 (1959) "to show that 'a particularized need' exists for the minutes which outweighs the policy

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[107] Quoting from the transcript at page 9: "MR. TYDINGS: . . . Mr. Finneran arrived with his counsel. He had difficulty recalling the facts and events which he was being questioned about by Mr. Weiner."

of secrecy.''[108] The need is to right the imbalance caused by the prosecutor's flagrant disregard of the command of Rule 6 (e). As this Court stated in *United States v. Socony-Vacuum*, 310 U.S. 150, 234 (1940) "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." The defense should have been granted access to the entire grand jury transcript of testimony subject to a protective order as to any portions which the government could demonstrate required suppression.

II

THE FOURTH CIRCUIT WAS WRONG IN HOLDING THAT THE INTERVIEW NOTES OF THE FBI AGENTS WERE NOT PRODUCIBLE UNDER THE JENCKS ACT

Manuel Buarque, Johnson's administrative assistants testified as a defense witness that he alone prepared the speech for Congressman Johnson and he was merely furnished some facts and figures for it by Hefflin. (App. 476-482). His testimony was vital to Johnson's defense because it negated the contention of the government that the speech had been prepared by Robinson.

In order to discredit Buarque's testimony the government called as a witness FBI agent Milne, who testified that at an interview on January 11, 1962, Buarque told him that he had not met Robinson until the spring of 1961 (9 months after the speech). Since Buarque had testified that he met Edlin and Robinson in the spring of 1960 (Tr. 5471) and there was no dispute as to this, Buarque's statement to the FBI, if so made, was false.

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[108] Also *United States v. Proctor & Gamble*, 356 U.S. 677, 683 (1958).

On cross-examination the FBI agent stated that during the interview he made written notes from which he later prepared an interview report. "I dictated it [his interview report] from notes that were made during the course of that interview." (Tr. 5474). Buarque did not sign the notes or the later interview report (Tr. 5473) and in fact was not shown them. The agent testified that he deliberately destroyed the original notes in accordance with FBI policy (Tr. 5474-5475). Government counsel stated on the record that the notes were destroyed pursuant to instructions contained in the FBI Manual (Tr. 5503) apparently issued after the Jencks decision (Tr. 5504-5505).

Johnson moved that the agent's testimony be stricken on the ground that the notes constituted "producible" Jencks Act (18 USC Sec. 3500) material and the failure of the government to retain and produce them violated Johnson's rights. Since the interview report of the FBI was made available to the defense, the District Court denied the motion.[109]

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[109] To rebut the testimony of Robinson and Johnson that the checks specified in the indictment were payments to Johnson for legitimate legal services, the Government called as a witness FBI agent Strickland who had interviewed co-defendant Robinson. The agent testified that Robinson made no mention to him of the $1,000 retainer fee of August 1, 1960, paid to Johnson (Tr. 5479) and Robinson stated that the total fees paid to Johnson were between $6,000 and $7,500 (Tr. 5481). This estimate of legal fees was considerably less than the sums admittedly paid to Johnson. The agent made notes of this interview at the time and from these notes prepared a narrative statement (Tr. 5479). Robinson read, corrected and signed this statement and a copy was given to him (Tr. 5479-80).

On cross-examination the agent stated that, after he prepared Robinson's statement, he deliberately destroyed the interview notes in accordance with FBI policy (Tr. 5484-5485). At the time he did so he knew that Robinson might be called as a witness in a prosecution against Johnson and that he himself might be called to testify (Tr. 5483-84). Johnson joined in a motion to strike the agent's testimony

The Fourth Circuit recognized that, if the notes qualified as a "statement" a "serious question arises" (p. 201). That Court critized the FBI policy with respect to the intentional destruction of interview notes. "If the notes were available, they might confirm or refute one version or another" and "one of the purposes of both the *Jencks* decision and the Jencks Act is to afford the defense an opportunity to impeach witnesses" (P. 202). The Fourth Circuit then erroneously held that the notes of the FBI agents did not qualify as a "statement" or as a "report" under the Jencks Act. In thus emasculating the Jencks Act the Fourth Circuit ruled that "by its terms the Act does not cover statements made either by a defendant or by a defense witness" and only the interview reports of the FBI agents were obtainable under the Act. The Fourth Circuit held that the FBI agents' interview reports were within the Jencks Act because in each instance the "report . . . was made by a government witness [the agent] . . . to an agent of the government" [his superior agent] but their original notes "were at most statements of Robinson and Buarque, not statements 'made by a government witness.'" (p. 202).

If accepted by this Court, this highly restrictive interpretation of the Jencks Act means that the original notes of a government agent are producible when the government agent interviews one who later becomes a government witness but are not producible when the agent interviews one who becomes a defense witness or a defendant. Such an attenuated distinction has not been drawn by this Court or by any other Court in the federal system.

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on the ground that the original interview notes were producible statements (Tr. 5499-5500). The Court denied the motion. Since Robinson, as general counsel for the savings and loan assocations, was the best informed witness as to Johnson's legal services, any testimony impeaching Robinson necessarily discredited Johnson's defense.

(a) This far reaching interpretation of the Jencks Act by the Fourth Circuit is erroneous.

First: The unambiguous language of the Act indicates that the original interview notes should be deemed a statement of a "prospective government witness," the phrase used in Section 3500(a), to an agent of the government. The intent is apparently to include the statement of any person interviewed in the course of a criminal investigation.

Second: At the time the government agent interviews a person in the course of a criminal investigation, ordinarily there is no means of knowing whether that person will be a government witness, a defense witness or a defendant. The determination is later made by the government. Whether he will be called as a government witness at the trial depends upon whether government counsel considers his statements allegedly made to the investigating agent helpful to the prosecution. Thus under the decision of the Fourth Circuit the production of the original notes of the FBI agent under the Jencks Act is determined by the later decision of the prosecution to call as a witness the person interviewed. If so called, he may be impeached by the original notes of the agent. If he is called as a defense witness or if he is made a defendant and a government agent testifies to his alleged contradictory statements to discredit his testimony, the agent's testimony cannot be impeached by his original notes but only by his interview report submitted to his superiors. Surely there is no logic or fairness in such an attenuated distinction. Happenstance should not be the determining factor in the application of the Act.

Third: When a government agent testifies to oral statements made to him by a defense witness contradicting the

testimony of that witness, there is as much necessity for the defense to be able to impeach the government agent by showing a variance or an omission in his notes as in the case of a non-government prosecution witness. FBI agents, treasury agents, i.e. "Law Men" are so romanticized that, enveloped in an aura of efficiency, heroism and objective impartiality, they speak in court with a convincing authority denied the ordinary witness. The honesty of an investigating agent may be unquestioned, but his interest in a successful outcome of a case investigated by him cannot be discounted. Hence the only possible impeaching tool on cross-examination, Jencks Act material, is more, not less, essential in this case than in the situation of the ordinary nongovernment witness for the prosecution.

Fourth: When a government agent records written contemporaneous notes of what a person interviewed allegedly tells him and the agent later testifies for the government to such statements, his notes are not merely a "statement" of the defendant or defense witness interviewed, as the Fourth Circuit held; they should be deemed a "statement" of the government agent under Section 3500(b). So, too, his original notes should be deemed a "statement" within the definition of Section 3500 (e) (1), namely, "a written statement made by said witness and signed or otherwise adopted or approved by him." Although not signed by the witness, the original notes should be deemed "otherwise adopted or approved by him" when the government agent vouches for their accuracy. The notes are the best evidence *of the agent's understanding* of the statements made to him by the witness. Over a period of a year an investigating agent must interview countless persons and he could not possibly be expected to recall what each one said except upon the basis of the written record. If a government agent testified from his original notes or from an interview report

prepared from the notes in a case involving the personal liberty of one accused of crime, the original notes i. e. the "statement", should be deemed adopted or approved by the government agent. Indeed there could not be in fact an approval or adoption more significant.

Fifth: The principle that original notes of a government agent are Jencks Act material available to impeach that agent when he testifies at trial would seem to be well settled by authority. In *Clancy v. United States,* 365 U.S. 312, 313-14 (1961) this Court expressly held that original notes made by government agents requested for just such a purpose may be Jencks Act material. This Court's opinion by Mr. Justice Douglas holds that each memorandum by treasury agents of statements made to them by the defendants was a "statement" as that word is defined in the Act and he suggests that otherwise the Jencks Act might be unconstitutional as a restriction upon due process. The Fourth Circuit ignored this authoritative and controlling determination. The distinction made by the Fourth Circuit also seems at variance with its own decision in *Holmes v. United States,* 271 F.2d 635 (1959), where that Court explicitly rejected the contention of the government that the Jencks Act did not apply to statements prepared by a government agent who became a witness at the trial.[110]

Concessions by the Solicitor General in three recent cases, *Killian v. United States* 368 U.S. 231, 239 (1961), *Evola v. United States* 375 U.S. 32 (1963) and *Clancy v. United States* 365 U.S. 312, 313-14 (1961), that notes by govern-

[110] In accord: *United States v. O'Connor,* 273 F.2d 358 (2d Cir. 1959); *United States v. Prince,* 264 F.2d 850 (3rd Cir. 1959); *Lewis v. United States,* 340 F.2d 678, 682 (8th Cir. 1965); *United States v. Berry,* 277 F.2d 826 (7th Cir. 1960); *Burke v. United States,* 279 F.2d 824, 826 (8th Cir. 1960); *United States v. Delucia,* 262 F.2d 610 (7th Cir. 1959).

ment agents may be Jencks Act material support our position as do the opinions of this Court in both *Campbell* cases.[111] The legislative history of subsection (e) indicates that Congress intended that it "would include a memorandum made by an agent of the government of an oral statement to him by a government witness . . .". *Palermo v. United States*, 360 U.S. 343, 359 (1959). Surely interview notes made contemporaneously by a government agent in the presence of the witness should also be deemed such a memorandum. If a more formal interview report later prepared by the agent from his notes is the equivalent of "a memorandum", the informal original notes certainly qualify as such "a memorandum."

Original written notes contemporaneously made by an FBI agent, in the course of an interview, of statements made to him by a witness, whether read back or not read back to the witness, have a greater claim to production at a criminal trial for impeachment purposes than a later interview report prepared by the agent from his original notes. The notes constitute primary evidence of the agent's understanding of the witness prepared in the course of the interview in the presence of the person interviewed; the interview report represents secondary evidence prepared later from his notes by the agent out of the presence of the witness.

Under these conditions it would be incongruous for the Court to hold that an interview report is discoverable under (e) (1) or (e) (2) of the Jencks Act but the original notes are not. Not only would there be no logic or reason for

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[111] In *Campbell II* the Supreme Court, in the opinion of Mr. Justice Brennan, held that the District Judge was not clearly erroneous in finding the notes to be producible under Section 3500 (e) (1) and the interview report to be a producible copy of the notes.

such a distinction but it would do violence to the purposes of the Jencks Act in reaffirming the holding of the Supreme Court in *Jencks* that a defendant on trial in a federal criminal prosecution is entitled for impeachment purposes to relevant and competent statements of a government witness touching the events or activities to which the witness has testified at the trial. *Campbell II*, p. 92. If the statute was designed to further the fair and just administration of criminal justice, as this Court has held it was (Campbell I, p. 92), then, as the Solicitor General conceded in *Killian*, *Clancy* and *Evola*, interview notes should be deemed to qualify as a statement of the witness under (e) (1) and (e) (2).

The extreme notion of the Court below that the Jencks Act should be interpreted to permit an accused to impeach the testimony of a government witness, who is not a government agent, with Jencks Act material in the possession of the government, but to deny to the accused the production of the most effective material, i.e. his original notes, to impeach a government agent who has testified, seems irreconcilable with the objective of the Congress in enacting the Jencks Act not only to preclude any general pillage of government files but to implement and safe-guard the basic constitutional principles of the *Jencks* decision.

(b) The deliberate destruction of interview notes by F.B.I. operatives as standard procedure in the aftermath of the Jencks legislation[112] has been viewed by the federal courts as requiring a "divining" of the *bona fides* of the

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[112] *Cf.* Orfeld, *Discovery During Trial in Criminal Cases: The Jencks Act*, 18 S.W. L.J. 212, 227 (1964); Cleary, *Hickman v. Jencks Jurisprudence of the Adversary System*, 14 Vand. L. Rev. 865, 874-75 (1961), *The Supreme Court, 1960 Term: Federal Criminal Law Enforcement: Discovery*, 75 H.L.R. 40, 179 at 181 fn 575 (1961).

operative in each case coming before them.[113] The result has been that this action pursuant to government policy has become *per se* action in good faith and sanctions have not been visited upon the government.

Assuming, as the lower federal courts have done, that the question is one of good faith to be determined in each particular case, the decision that the operative is in fact acting in good faith is in practice compelled. It would strain the bounds of credulity to believe that the courts are likely to find *mala fides* on the part of the operative when acting in obedience to his master's mandate when that master is the Department of *Justice* itself. The real question, a question that has not been adequately faced in those cases, is whether, regardless of the *bona fides* of the agent, the destruction of the interview notes should render the agent's testimony inadmissable.

The court decisions cited above assume that, if a government agent destroys evidence pursuant to a general directive of his superiors, he necessarily acts in good faith. They assume that the propriety of the government policy is beyond question. There is also inherent in these decisions the presupposition that the unverifiable testimony of a government agent that his interview report accurately embodies statements made to him by the accused or by the witnesses as contained in his interview notes (now reduced to ashes) must be deemed flawless. To the contrary, it is submitted that however able, intelligent, devoted, obedient, loyal, and well-trained FBI agents may be, the philosophy incident to these premises is foreign to the Sixth Amendment right to confrontation and to the American concept

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[113] *Ogden v. United States,* 323 F.2d 818, 820 (9th Cir. 1963); *United States v. Thomas,* supra p. 194; *United States v. Tomaiolo,* 317 F.2d 324, 327 (2d Cir. 1963); *United States v. Greco,* 298 F.2d 247, 249, 250 (2d Cir. 1962).

of due process, fair trial and the fallibility of the state and its agents.

When, as in the case at bar, important interview notes made by an F.B.I. agent of statements made to him by a defendant and a witness are willfully destroyed pursuant to Bureau policy, is not the inference irresistible that the only conceivable purpose of the policy is to circumvent the decision of this Court in *Jencks* and the later Jencks Act by precluding at the trial any verification of the interview report with the agent's actual notes of statements made to him by the witness? What other purpose could there be?

When a government agency directs its agents to destroy interview notes after they have been allegedly reduced to an interview report, the obvious effect is to preclude any comparison of the interview report with the agent's actual notes contemporaneously made with respect to statements made to him by the witness. No government department or bureau could prepare and promulgate instructions directing the *immediate* destruction of the notes without consideration of this evident consequence of the directive. Since no other conceivable purpose is served by such a policy, it must be assumed that this is its objective.[114] The destruction of such significant basic data by government agents is morally intolerable and shocks the conscience.

It was especially important in this case that access to the notes of the FBI agents be available to the defense. The original notes of agent Milne might well have confirmed Buarque's testimony that he met Edlin and Robinson in the spring of 1960, he told Milne that and thus Milne made an error—"1961" for "1960"—in his interview re-

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[114] It would not appear that the Treasury Department has such a policy. See *Clancy* at 314.

port prepared from his notes. FBI agent, Strickland, testified that a significant fact was *not* related to him by Robinson. Thus Strickland was not testifying as to statements contained in his narrative report but as to what he claimed Robinson had not said to him. It became crucial for the defense to show that the FBI agent's interview report to his superiors, though signed by Robinson, did not include the additional statement Robinson testified he made to Strickland. This could be done only by the production of the contemporaneous interview notes denied the defense.

The important issue here should not be resolved in terms of the "good faith" or "bad faith" of the administrative policy of the government or in terms of the mental state of the F.B.I. agent in acting pursuant to that policy. Nor should the imposition of the sanctions of Section 4 of the Jencks Act be dependent upon whether the administrative policy was permissibly or impermissibly inaugurated to circumvent the decision in *Jencks* or the Jencks Act or to preclude cross-examination with respect to the contents of the notes or even to serve some other purpose. A sound public policy should not require the judiciary to inquire into the good faith of government officials except when such an inquiry is unavoidable.

An unlawful search or seizure is not resolved in terms of whether the police officers acted pursuant to administrative policy or upon the instructions of their superiors. Nor is the issue of the validity of a confession determinable in terms of a directive contained in a police manual. As the *Jencks* Act was designed not only to overrule exaggerated decisions of the lower federal courts misinterpreting *Jencks* but also to implement the Sixth Amendment right of confrontation and due process declared in *Jencks*, the statutory

remedy of Section 4 of the Jencks Act cannot depend upon the purpose or propriety of administrative policy.

The *Jencks Act* itself provides that in the case of dispute as to whether material is to be given to the defendant" . . . the entire text of such statement shall be preserved by the United States . . ." pending appeal by the defendant. This statutory language indicates that the requirement that the material in question must be" . . . in the possession of the United States . . ." was not intended to allow the government to suppress Jencks Act material by the simple expedient of destroying it and so deny the benefits of the Act to a defendant.

The Fourth Circuit recognized in this case the basic unfairness of the F.B.I. policy directing that interview notes be destroyed. 337 F.2d 180, 202. The Second Circuit has agreed that "it would be the better practice to preserve written notes taken on interviews of persons accused or suspected of crime." *United States v. Thomas,* 282 F.2d 191, 194 (1960). In *Killian v. United States,* 368 U.S. 231, 242 (1961) the opinion for this Court of Mr. Justice Whittaker contains the *dictum* that, if notes were destroyed by agents in good faith and in accord with normal practice, their destruction did not constitute an inpermissible destruction of evidence nor deprive petitioner of any right. But in its later opinion in *Campbell II* (*Campbell v. United States,* 373 U.S. 487 (1963)) this Court made clear that it did not accept that *dictum* by holding that in that case the Court had not considered whether sanctions should attach to the destruction by the special agent of his interview notes pursuant to F.B.I. policy. The Court was careful to state "we intimate no view on the correctness of the Court of Appeals' rulings on this" i.e., that the destruction of the notes was in good faith. (p. 491, note 5).

In *Wilson v. United States*, 162 U.S. 613, 621 (1896) it was held that the willfull destruction or suppression of evidence by an accused gives rise to a presumption of guilt. Unless an alien concept of infallible statism is to be exalted, the deliberate destruction by government agents of evidence, whether pursuant to administrative policy or not, should be deemed also suppression of evidence and thus repugnant to basic principles of due process, fair play and fair trial. The contrary view would mean that there is a nigh irrebuttal presumption that the interview report of a government agent is an accurate recital of oral statements made to him by a witness as recorded contemporaneously in his notes and the agent's unverifiable testimony to this effect is so sacrosanct as to be beyond inquiry. It is submitted that such an assumption is not compatible with the Sixth Amendment right of confrontation and present concepts of due process. Nor is it consistent with the context, high purpose and spirit of the Jencks Act.

This Court has held that suppression by the prosecution of material evidence favorable to an accused violates due process "irrespective of the good faith or bad faith of the prosecution"[115] thus clearly recognizing the basic constitutional right of an accused to have access to favorable evidence that is in the hands of the state regardless of the "good" intentions of the prosecution.

Accordingly, it is submitted that the Jencks Act, when interpreted in conformity with the constitutional principles enunciated in *Jencks*, required the production of written interview notes made by government agents and that the willfull destruction of such notes required the imposition

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[115] *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See also *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Wilde v. Wyoming*, 362 U.S. 607 (1960); *Mooney v. Holohan*, 294 U.S. 103 (1935).

of the sanctions provided in Section 4 of the Act, namely, the exclusion of the agent's testimony.[116]

III

THE DISTRICT COURT WAS WRONG IN REFUSING TO INSTRUCT THE JURY AS TO AN ESSENTIAL ELEMENT OF THE SUBSTANTIVE OFFENSE

Sec. 281 made it an offense when a member of Congress "directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered" in relation to any proceedings or matter in which an executive department of the government of the United States is interested.

The proscribed receipt of compensation cannot be accomplished without an intent on the part of the Congressman to receive the payment as compensation for his alleged services. Accordingly the statute requires concert of action on the part of the receiver and the giver.[117] Although it was not necessary for the jury to find a specific criminal intent, i.e., a conscious purpose of wrongdoing or evil motive, an *essential element of the offense* was that the member of Congress know, understand and appreciate that the payments made to him constituted compensation for the services rendered.[118]

While the statute does not define the meaning of receipt of compensation for the prohibited services rendered, established legal principles with respect to the construction

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[116] If the Jencks Act does not apply, then due process as interpreted in *Jencks,* required the production of the notes of the F.B.I. agents.

[117] *May v. United States,* 175 F.2d 994, 1008-09 (majority opinion) and 1014 (dissenting opinion) (C.A.D.C. 1949).

[118] *United States v. Quinn,* 141 F.S. 622, 627 (S.D.N.Y. 1956).

of a penal statute of this character require the conclusion that a subjective awareness by the actor of the nature of his conduct is an essential element of the offense.[119] In *Smith v. United States*, 361 U.S. 147 (1959) this Court struck down an ordinance not requiring *scienter* on the part of a seller of obscene literature as a precondition of guilt. It held that the ordinance tended to inhibit expression protected by the First Amendment. That reasoning is especially relevant in the case at bar where the First Amendment activities of a Congressman are involved. Without a requirement of subjective awareness of the nature of his conduct under Sec. 281 any member of Congress could be convicted of a felony for his unwitting or unconscious acts.

In order to implement these principles Johnson requested the following instruction which was denied:

> "12. The Court instructs the Jury that, if they find that Johnson sincerely believed at the time the check specified in a substantive count was received by him as compensation for bona fide legal services rendered by him to the savings and loan associations or to the land companies and that such check was not received by him as compensation for his visits to the Depart-

[119] See generally *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952) involving culpable intent and *Morissette v. United States*, 342 U.S. 246 (1952) where the knowledge requirement is more closely akin to that in the case at bar. See also *Lambert v. California*, 355 U.S. 225 (1957) where this Court struck down a statute making it a criminal offense for persons convicted of a felony to fail to register as convicted felons regardless of their knowledge of the registry requirements. The Court held that a mere failure to register could not be the basis of a criminal charge without actual knowledge by the defendant of the registration requirement. In this case had the defendant Johnson "registered", i.e., informed the Justice Department that he was acting as an attorney in a criminal case and not as a Congressman, a criminal charge would not lie.

ment of Justice, the Jury must find Johnson not guilty as to said substantive count." (App. 969).

The Court also denied Johnson's equivalent requested Instruction 13 (App. 970).[120]

These instructions were vital in the case. Under the substantive counts the co-defendants were charged, and were put on trial, as aiders and abettors of Johnson and the jury's attention was constantly directed during the trial to the attitudes and acts of, and alleged statements made by, these co-defendants out of the presence of Johnson relative to their hopes and intentions with respect to the visits to Justice. Edlin had been quoted by Goldman as saying out of the presence of Johnson and Boykin that Johnson and Boykin "were not getting anywhere with his indictment, that it is costing him a lot of money" (Tr. 1475) and Raines quoted Edlin out of the presence of Johnson as saying "we have friends on the Hill—we have nothing to fear on our indictment. These people are interested in us and the injustice we have been done." (Tr. 172). These statements, hearsay as to Johnson, tended to shift the jury's attention away from the question of *Johnson's understanding* as to the basis of the payments to *Edlin's purpose* in causing the payments to be made. Further, the absence of a *mens rea* instruction in this case made it especially important that the jury's attention be directed at some point to the question of Johnson's understanding of the nature of the payments to him.

A fundamental objective of these instructions was to distinguish between what may have been in the mind of Edlin with respect to these checks, and what may have been in

[120] After the charge, these instructions were requested again by Johnson's counsel but were denied (App. 112). Johnson's motion for a new trial alleged their denial was prejudicial error. (App. 982).

the mind of Johnson. If the jury believed that Edlin considered that these sums were in payment of Johnson's visits to Justice, that was not enough to permit the jury to convict Johnson of a felony under the substantive counts. For the commission of the alleged crime, Johnson himself must have personally understood that the checks constituted compensation for his visits to Justice. Johnson was not chargeable with Edlin's mental processes but only his own. Edlin's intent was not imputable to Johnson. Johnson could not be convicted of this felony on the ground that he *ought* to have understood that the checks constituted compensation for his visits to Justice. Actual intention not constructive intention, is a prerequisite to guilt. *Robinson v. United States*, 32 F.2d 505, 509 (8th Cir. 1929), (holding in a bribery case that the intention of the donor is not imputable to the donee. Guilt is measured by one's own intention and not by the intent of someone else); *United States v. Henry*, 52 F.Supp. 161, 163 (D. Nev. 1943).[121]

The Court's instructions as to the defendant Johnson's knowledge were vague, ambiguous, and contradictory. The District Court made no distinction between the belief of Edlin and the belief of Johnson with respect to the receipt of the checks. Thus the case went to the jury without an instruction that Johnson's understanding of the transaction had to be determined by the jury as a necessary element of the offense.

The Court charged that it was only when the services referred to in Section 281 are rendered for compensation that there is a violation (App. 102) and that with respect to each check the jury "must consider whether each such check was *given* in whole or in substantial part for serv-

[121] To the same effect 11 C.J.S., Sec. 2, Bribery, p. 844; *People v. Ewald*, 302 Mich. 31, 4 N.W. 2d 456; *People v. Vollmann*, 73 Cal. App. 2d 769, 167 P.2d 545; 12 Am. Jur. 2d, Sec. 6, Bribery p. 752.

ices rendered by Johnson before the Department of Justice within the meaning of Section 281" (App. 103). (Emphasis added). Thus here the Court directed the jury to consider the purposes of Edlin and Robinson. The Court then stated: "If you find that the check referred to in Count 2 was received by Johnson as compensation for bona fide legal services rendered by him to the savings and loan associations and later to the land companies, and not, in whole or in substantial part, for services rendered by Johnson before the Department of Justice, then you should find Johnson not guilty on the second count. The same instruction applies with respect to each count 3 to 8 as well as to Count 2", etc. (App. 104).

After the portions of the charge quoted above, the Court told the jury that, if they found that Johnson did not knowingly receive a check, or a substantial part thereof, as compensation for his visits to Justice, they should acquit under the substantive counts (App. 104). This use of the word "knowingly" was clearly not enough because (1) the Court had already confused the jury, i.e., as to who had to know what about whom, by emphasizing the hopes and beliefs of the maker of the checks, (2) it contradicted other parts of the charge, (3) it merely modified the receipt of checks, (4) there was no definition as to its meanings and (5) other portions of the charge, including those quoted above, did not include this adverb.

The Courts' use of the term "knowingly" at one point in the charge with respect to Johnson's receipt of the check in question and its use of the phrase "received as compensation" in another portion of the charge could not cure the manifest error in its earlier direction to the jury that Johnson's guilt was to be determined by reference to the beliefs of Edlin or Robinson in *giving* the check. The only reasonable view of an attentive juror of these

contradictory instructions would be that there were alternative routes to the conviction of Johnson, namely, conviction could be based on either Edlin's or Robinson's understanding or on Johnson's.

As an elected representative of the people a member of Congress has not only a right, but an affirmative obligation, to protest acts of unfairness or injustice reported to him as having been done by an administrative agency or department of the government. In this case Johnson testified that he had been informed by Edlin and Robinson that the indictment against Edlin had been inspired by competitors, was without a valid basis and was grossly unjust; that by reason of these representations, he had made his visits to the Department of Justice seeking a review of the merits of this criminal case, and that he was not compensated for doing so directly or indirectly and the checks received by him were in payment of legal services rendered the savings and loan associations and later the land companies unrelated to his visits to Justice. Robinson and others testified that these representations had been made to Johnson. He confirmed Johnson's testimony that he had not received, directly or indirectly, any compensation for his visits to Justice.

Although there was no affirmative testimony that the fees paid Johnson for his legal services were excessive, if the jury believed that the payments made to Johnson for his legal services rendered the savings and loan associations and the land companies were excessive, or even merely large, they could have found Johnson guilty of the substantive offenses under the charge of the District Court *even though Johnson sincerely believed that those payments did not represent compensation for his visits to Justice.* The instructions given were at variance with the right, if

not the obligation, of a member of Congress to protest allegedly unfair and unjust administrative acts. Thus they were contrary to the intent of the statute. The instructions allowed a guilty finding in the absence of the requisite understanding of the defendant, Johnson, of the nature of the payments made to him.

CONCLUSION

The decision of the Court of Appeals that the conspiracy count is unconstitutional should be affirmed. The autonomy and independence of Congress and the integrity of our tripartite constitutional system are at stake. While in recent years in the United States the judiciary has been the foremost champion of liberty, this has not always and universally been true. As we have shown, there were times in England when the true champion was the legislature, arrayed against both Crown and judiciary. The time may again recur when uninhibited speech in Congress will be the chief barrier to tyranny.

The holding below on the conspiracy count should be affirmed for the additional reason that it violated Johnson's Fifth and Sixth Amendments rights.

Further, we respectfully submit that this Court should make clear that, in the event of a new trial on the substantive counts, Johnson is entitled to the rudiments of a fair trial, namely, (i) access to the grand jury transcript, (ii) production of the underlying FBI interview notes under the Jencks Act and and the *Jencks* decision and (iii) the essential instructions requested by Johnson.

Alexander Hamilton wrote: "Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever

appeared to me to be the great engine of judicial despotism.'"[122]

Johnson submits his case in the confidence that such an engine cannot exist as long as this Court sits.

Respectfully submitted,

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Counsel wish to acknowledge the valuable assistance rendered in connection with this Brief by Richard J. Himelfarb, a 1965 graduate of the Yale Law School.

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[122] *The Federalist*, p. 462 (The Colonial Press 1901).